

Docketed:

May 21, 1996

Court: Supreme Court of Alabama

Entry Date

Proceedings and Orders

May 16 1996 Petition for writ of certiorari filed. (Response due June 20, 1996)

Jun 13 1996 Waiver of right of respondent Liberty National Life Insurance Company to respond filed.

Jun 19 1996 DISTRIBUTED. September 30, 1996

Jun 19 1996 Brief of respondent Charlie Frank Robertson, Class Representative in opposition filed.

Oct 1 1996 Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. Rule 29.2 does not apply.  
SET FOR ARGUMENT January 14, 1997.  
\*\*\*\*\*

Nov 12 1996 Joint appendix filed.

Nov 12 1996 Brief of petitioners Guy E. Adams, et al. filed.

Nov 12 1996 Brief amici curiae of New York, et al. filed.

Nov 12 1996 Brief amicus curiae of Association of Trial Lawyers of America filed.

Nov 12 1996 Brief amicus curiae of Trial Lawyers for Public Justice, P.C. filed.

Nov 25 1996 CIRCULATED.

Dec 3 1996 Record filed.

Dec 6 1996 Brief amicus curiae of Alabama filed.

Dec 9 1996 Brief of respondent Liberty National Life Insurance Company filed.

Dec 9 1996 Brief amicus curiae of American Council of Life insurance filed.

Dec 10 1996 Brief of respondent Charlie Frank Robertson filed.

Dec 10 1996 Brief amici curiae of Continental Casualty Company, et al. filed.

Dec 10 1996 Brief amicus curiae of Natl. Assn. of Manufacturers and Lawyers for Civil Justice filed.

Dec 10 1996 Brief amicus curiae of Exxon Corporation filed.

Dec 26 1996 Reply brief of petitioners Guy E. Adams, et al. filed.

Jan 6 1997 Record filed.

Jan 14 1997 ARGUED.



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In The  
**Supreme Court of the United States**  
October Term, 1995

GUY E. ADAMS, *et al.*,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

On Petition For A Writ of Certiorari  
To The Supreme Court Of Alabama

**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether the certification and settlement of this nationwide class action pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B) of the *Alabama Rules of Civil Procedure*, with no right to opt out, violate the Due Process Clause of the Fourteenth Amendment when all class members suffered individual monetary damages but the vast majority of class members receive no monetary compensation for the release of their claims for compensatory and punitive damages.



## LIST OF PARTIES

Petitioners are policyholders of Liberty National Life Insurance Company whose cancer policies were fraudulently exchanged by Liberty National and who objected to the certification and settlement of this class action. Petitioners' respective appeals to the Alabama Supreme Court were decided by the opinion in *Guy E. Adams v. Charlie Frank Robertson*, No. 1931603, slip op. (Ala. Dec. 22, 1995) (App. 1a-20a). The names of all of the Petitioners, who are collectively referred to herein as "Objectors," are listed in the Appendix at 109a-121a.

The Respondents are Charlie Frank Robertson, the Plaintiff and Class Representative, and Liberty National Life Insurance Company, the Defendant.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Guy E. Adams, *et al.* (collectively "Objectors"), respectfully petition for a writ of certiorari to review the constitutionality of the judgment of the Alabama Supreme Court in this case.

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 OPINIONS BELOW

The opinion of the Alabama Supreme Court (App. 1a-20a) is not yet reported. The findings of fact and conclusions of law and the order of the Circuit Court of Barbour County, Alabama, which were affixed as an appendix to the opinion of the Alabama Supreme Court (App. 21a-92a and 93a-106a, respectively), also are unreported.

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 JURISDICTION

The decision of the Alabama Supreme Court was rendered on December 22, 1995, and a timely application for rehearing was overruled on February 16, 1996 (App. 108a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

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 CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: " . . . nor shall



any State deprive any person of life, liberty, or property, without due process of law. . . . "

### STATEMENT

The Alabama Supreme Court's holding in this case squarely raises an issue not previously addressed by this Court: whether due process is violated in an action involving individual monetary damages when a mandatory class is certified pursuant to Rules 23(b)(1) or 23(b)(2)<sup>1</sup> in order to evade the requirement that class members in actions seeking predominantly monetary relief be given the opportunity to exclude themselves from the class. The certification and settlement of this broad, nationwide mandatory class action of over 400,000 cancer insurance policyholders of Liberty National Life Insurance Company ("Liberty National") by the Circuit Court of Barbour County, Alabama, epitomize the abuse and manipulation of class actions to the detriment of the victims of mass torts which have been the subject of recent legal and public debate.

Class Counsel obtained from William H. Robertson, Circuit Judge of Barbour County ("Circuit Judge")<sup>2</sup>, preliminary certification of a mandatory class pursuant to

<sup>1</sup> As noted herein, this case was certified pursuant to ALA. R. CIV. P. 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B). ALA. R. CIV. P. 23 is identical to FED. R. CIV. P. 23, see App. 5a, and hereinafter Objectors accordingly cite to "Rule 23" in lieu of identifying whether the Alabama or Federal rule is referenced unless the context requires otherwise.

<sup>2</sup> Class Counsel, Jere L. Beasley, Esquire, Judge Robertson and Barbour County have attracted national media attention.

Rule 23(b)(2) with feigned opposition by Liberty National and in the face of evidence that settlement negotiations between Class Counsel and Liberty National were substantially complete before the class was certified. Class Counsel and Liberty National then obtained the Circuit Judge's approval of a class settlement which provides monetary relief for only a small number of class members although all class members suffered monetary damage sufficient to support a claim for fraud under Alabama law;<sup>3</sup> does not allow any class member, including

See, e.g., David Frum, *Send Them A Message*, FORBES, Dec. 6, 1993, at 86 (App. 122a-125a); Gregory Jaynes, *Where the Torts Blossom; While Washington Debates Rules About Litigation, Down in Alabama, The Lawsuits Grow Thick and Wild*, TIME, Mar. 20, 1995, at 38 (App. 126a-132a); Phillip Rawls, *Abundance of Lawsuits Earn Alabama Title: 'Jackpot Justice'*, CHICAGO TRIBUNE, Feb. 28, 1996, at 2; (App. 133a-135a).

<sup>3</sup> The Circuit Judge's order of March 10, 1993, preliminarily certifying the class excludes from the class any insured, who, on or before the date of the order, had filed a separate action against Liberty National asserting claims arising out of the cancer policies. Over thirty (30) cases involving the same fraudulent cancer exchange program at issue here were pending against Liberty National at that time and two of them reached the Alabama Supreme Court. In *Boswell v. Liberty Nat'l Life Ins. Co.*, 643 So. 2d 580 (Ala. 1994), the Alabama Supreme Court reversed the trial court's dismissal of a suit brought by a policyholder whose cancer policy was fraudulently exchanged by Liberty National, but who had not made a claim pursuant to the policy, and held that the payment of additional premiums for a new, less valuable policy constituted damage sufficient to sustain a claim for fraud. Subsequently, in *Liberty Nat'l Life Ins. Co. v. McAllister*, No. 1931163, 1995 WL 129224 (Ala. Apr. 7, 1995) ("*McAllister*") (App. 137a-151a), the Alabama Supreme Court affirmed a jury verdict of \$1,001,000 in damages awarded to a policyholder whose policy also had been fraudulently

out-of-state residents, to opt out; requires all class members to release all known and unknown claims against Liberty National and its parent, Torchmark Corporation ("Torchmark"), and their agents and employers, arising out of any prior tortious conduct or breach of duty related to the sale of the cancer policies; and provides for the cash payment of an attorneys' fee to Class Counsel of \$4.5 million.

This action arose out of a massive "cancer policy exchange program" conducted by Liberty National between 1986 and 1993 to induce owners of existing Liberty National cancer policies, sold prior to 1986, to exchange their policies for new cancer policies. The policies sold prior to 1986 included one hundred percent (100%) coverage for radiation therapy, chemotherapy and all drugs and medicines prescribed for use outside the hospital in the treatment of cancer ("old policies"). The new cancer policies contained some additional benefits but (1) limited coverage for radiation and chemotherapy to \$500 per day, (2) limited coverage for prescription chemotherapy drugs and (3) eliminated any coverage for other out-of-hospital prescription drugs such as pain or anti-nausea medication ("new policies").

Liberty National instituted the exchange program and developed the new policies to stem a dramatic

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exchanged but who had not made a claim pursuant to her policy. *McAllister* was tried in the Circuit Court of Mobile County, Alabama, in October 1993, and a copy of the trial transcript and exhibits from that case were submitted to the Circuit Judge prior to the fairness hearing and were made a part of the record in this case. (C.3609-624; 5660).

increase in claims costs and increasingly adverse loss ratios it began incurring on the old cancer policies in the early 1980's as a result of the unlimited radiation, chemotherapy and prescription drug benefits. (Testimony of John Sanford, President of Liberty National from 1982 to 1989, *McAllister* ["McA"], Transcript 1103-1112).<sup>4</sup> The majority of the old policies were guaranteed renewable for life, and the only way that Liberty National could alter the unlimited benefits was to induce policyholders to exchange their old policies. (*Id.*).

Liberty National set about to convince policyholders to exchange their old policies for the new policies by not disclosing to policyholders that the unlimited benefits, which had been the major selling point of the old policies, were restricted or eliminated in the new policies. In addition to limiting its exposure on the unlimited benefits, Liberty National charged higher premiums for the new policies by alleging they were better policies and, at the same time, further increased premiums by shifting policyholders who had purchased policies when they were younger into older age bands.<sup>5</sup>

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<sup>4</sup> The *McAllister* transcript and exhibits were all a part of the record forwarded to the Alabama Supreme Court but were not made a numbered part of the Clerk's record.

<sup>5</sup> When health insurance, such as cancer insurance, is purchased, the insured is rated and charged a premium based upon the age band into which the insured falls on the date of the issuance of the policy. Younger insureds pay lower premiums than older insureds for the same coverage. For purposes of premium computation, a policyholder who purchased his or her policy at age 25 will always be charged a premium based upon his or her age on the date of the issuance of the policy, even as to later premium increases. In other words, if the 25 year old



Class Representative Charlie Frank Robertson ("Robertson") initially filed a complaint against Liberty National in the Circuit Court of Barbour County, Alabama, in May 1992 based upon alleged unauthorized loans on a life insurance policy. (C.1-6). On October 1, 1992, Robertson filed an amended complaint including claims against Liberty National on behalf of all individuals whose old cancer policies had been exchanged for new policies and a motion for an order certifying a class action pursuant to Rules 23(a), 23(b)(2) and 23(b)(3). (C.66-67). The amended complaint sought *money damages for fraud* and the motion for certification similarly emphasized that the action was brought *for damages*.<sup>6</sup>

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policyholder ages ten years, his or her premium, for rating purposes, is still based upon his or her age on the date of the issuance of the policy. In inducing its cancer insurance policyholders to exchange their policies, Liberty National charged Objectors, many of whom had owned their cancer insurance policies for years before the exchange, a new premium based upon the Objector's age on the date of the exchange, i.e., the date of issuance of the new policy. Accordingly, when the exchange of the cancer policies occurred, the premium paid by the Objectors was higher not only because the new policy was more expensive, but also because many of the Objectors had aged and were in an older age bracket at the time of the exchange.

<sup>6</sup> The motion for certification stated that the action was brought "... for damages for Defendant's scheme to trick owners of cancer policies that provided comprehensive coverage for radiation and chemotherapy treatment, drugs, and other benefits into switching to an 'updated' cancer policy that provided substantially less radiation and chemotherapy coverage, drugs coverage and other benefits." Robertson contended in the motion that "... although 23(b)(2) and 23(b)(3) are the preferable classes of certification in this matter, class

The Circuit Judge set a hearing on the motion for certification on October 16, 1992. (C.88). Liberty National filed a brief in opposition to certification of the class and requested additional time to conduct discovery. (C.98-101). Although the Circuit Judge continued the certification hearing set on October 16, 1992, Liberty National subsequently conducted only minimal discovery, and the record reflects that Liberty National's focus in October 1992 was on settlement, not opposition to class certification.

Liberty National's discovery essentially consisted of taking the depositions of Robertson and two former Liberty National employees who also were designated as class representatives. These depositions were not submitted to the Circuit Judge either prior to preliminary certification of the class or before conditional approval of the settlement. In fact, they were never before the Circuit Judge until Objectors sought production of these depositions prior to the fairness hearing. The only other discovery conducted by Liberty National was service of interrogatories and a request for production upon Robertson (which were never answered) and service of a request for admission, interrogatories and request for production directed to Robertson's individual claim. (C.141-65).

On November 20, 1992, only a month after the delay of the certification hearing, Liberty National submitted "settlement" policies to the Alabama Department of Insurance which were prepared by Liberty National's

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certification under 23(b)(1) is proper and in the alternative, Plaintiff seeks class certification pursuant to 23(a) and 23(b)(1)." (C.66-67).



chief actuary, Anthony McWhorter, in connection with the class action. (R.491). Mr. McWhorter testified that he had worked on the settlement policies for at least two weeks and possibly a month before they were actually submitted. (R.491-92).

Even more telling, Liberty National apparently attempted to have a "no opt out" class certified in regard to the cancer exchange program in separate litigation pending in Mobile County, Alabama, in late 1992 or early 1993. During a hearing held in April 1993 relating to a class action concerning the cancer exchange program filed in Mobile County with an opt out provision, counsel for that class representative stated in open court and in the presence of counsel for Liberty National that Liberty National had approached a Mobile County judge in earlier litigation about certifying a non opt out class based upon the cancer exchange program. (*Ex parte Eunice W. Long*, No. 1921852, *infra*, Brief in Support of Petition for Writ of Mandamus, Ex. R). No categorical denial was made by counsel for Liberty National, and a Mobile County judge later confirmed that Liberty National lawyers had approached him in 1992 or early 1993 about certifying a no opt out settlement in connection with the cancer exchange program. *Mobile Press Register*, Dec. 4, 1994.

The record itself reflects that Class Counsel and Liberty National were involved in settlement negotiations which were complete at least in principle prior to certification of the class. On January 29, 1993, the Circuit Judge issued an order setting a hearing for March 8, 1993, on the motion for certification. (C.140). The Circuit Judge's order stated that he was setting the motion

because it had been "... set once, and continued by the Court due to representations by counsel for Defendant that *this action and other related cases were to be settled . . .*" (emphasis supplied). (*Id.*).

At the hearing on March 8, 1993, Liberty National made no factual or legal arguments against class certification (*Ex parte Eunice W. Long*, No. 1921852, *infra*, Brief in Support of Petition for Writ of Mandamus, Exhibit F 30-31). An entry on the docket sheet for March 8, 1993, states "Class Action settled. Attorneys to prepare order" (C.5967), although in his findings of fact the Circuit Judge claimed this docket entry was made in error. (App. 33a).

On March 9, 1993, one day before the Circuit Judge entered the order preliminarily certifying the class, Class Counsel Jere Beasley filed four individual lawsuits in Barbour County against Liberty National for other policyholders seeking money damages based upon the same fraudulent cancer exchange program. The next day, all other victims of Liberty National's fraud found themselves forever barred from similar individual lawsuits. But for their cases being filed on the day before the order's entry, Class Counsel's other four plaintiffs likewise would have been limited to the class settlement. (*Ex parte Eunice W. Long*, *infra*, No. 1921852, Brief in Support of Petition for Writ of Mandamus, Ex. J and K). One cannot imagine a more clear cut example of a class counsel who knows the terms of the class certification and the settlement he has negotiated are woefully insufficient for his personal clients but yet *imposes them* on the faceless members of the class he purports to represent.

On March 10, 1993, the Circuit Judge entered an order preliminarily certifying a class pursuant to Rule 23(b)(2). (C.174-75).<sup>7</sup> On the same day, the Circuit Judge issued an order dismissing Counts One (1) and Two (2) of Robertson's complaint in regard to the alleged unauthorized loans on his Liberty National life insurance policy. (C.176). During the fairness hearing, it was confirmed that Robertson settled those claims on his life insurance policy at that time for \$150,000. (R.677).

On April 30, 1993, certain Objectors filed motions to intervene to object to class certification and to request leave to be excluded from the class (C.205-19), and other Objectors subsequently moved to intervene. On June 16, 1993, while the motions to intervene were pending, Liberty National and Class Counsel filed a Stipulation and Agreement of Compromise and Settlement ("Stipulation"), which redefined the class and set forth provisions

<sup>7</sup> The order defined the class as follows:

All past and present insureds under cancer policies issued by Liberty National Life Insurance Company ("Liberty National") providing unlimited coverage for radiation, chemotherapy, and out-of-hospital prescription drugs ("old policy"), which coverage was effective on or after August 29, 1986, the date that Liberty National offered new replacement cancer policies limiting coverage for radiation, chemotherapy, and out-of-hospital prescription drugs ("new policy"), excluding from the certified class any insured, who on or before the date of this class certification order, has filed a separate action against Liberty National asserting claims arising out of the cancer policies on coverage.

of a proposed settlement which, among other things, did not allow any class members to opt out and required all class members who to date had not made claims pursuant to their cancer policies to release any pending or future claims for compensatory and punitive damages without any monetary compensation.

The proposed settlement provided that (1) class members who had incurred expenses for radiation, chemotherapy or out-of-hospital prescription drugs which were not covered by their new policies but would have been covered under their old policies could submit proof of claim forms prior to December 20, 1993, and share in a \$1,000,000 Incidental Monetary Settlement Fund ("Incidental Fund"); (2) class members who had incurred expenses for radiation, chemotherapy or out-of-hospital prescription drugs and had received less in total benefits under their new policies than they would have under their old policies could submit proof of claim forms prior to December 20, 1993, and share in a \$3,000,000 Supplemental Extra Contractual Monetary Relief Fund ("Extra Contractual Fund"); (3) class members who had made claims for radiation, chemotherapy or out-of-hospital prescription drugs which were denied under the new policies, but which would have been paid under the old policies, could submit proof of claim forms prior to December 20, 1993, and obtain 100% restitution; (4) Liberty National would reform its cancer policies to eliminate the coverage advantages it created for itself by the cancer exchange program; (5) a moratorium would be placed on cancer policy premium increases on these policies reformed by the settlement until January 1, 1995; and (6) Liberty National would pay Class Counsel up to



\$4,500,000 in attorney's fees. The proposed Settlement also called for an entry of a judgment by which all claims arising out of the cancer exchange program against Liberty National, Torchmark and their agents and employees would be released, even though Liberty National was the only defendant named in the action.<sup>8</sup> (C.281-324).

On the same day the Stipulation was filed, and without any notice to the Objectors, the Circuit Judge entered an order preliminarily approving the settlement in accordance with the Stipulation. The order also set a fairness hearing for October 20, 1993, set forth provisions for notice to absent Class Members, provided that any member of the class who wished to be heard at the hearing would be required to provide written objections and copies of any supporting papers and briefs to Class

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<sup>8</sup> Pursuant to the stipulation, every class member releases . . . all claims, causes of action and liabilities (known or unknown) which have been or could be asserted by any Class Member, whether arising under state or federal statutory or common law, to the extent such claims, causes of action or liabilities arise from, are connected with, or are in any way based upon or related to any allegation of fraud, misrepresentation, concealment, failure to disclose, or other tortious conduct or breach of duty which occurred in whole or in part on or before the date of this Settlement Agreement, regarding (1) the alleged cancer policy exchange programs, (2) any other transaction resulting in the issuance of a new policy providing cancer coverage for a Class Member previously insured under an old policy, or (3) the failure to offer or issue any Class Member a new policy (the "Released Claims").

(C.313-14).

Counsel and counsel for Liberty National not less than ten days before the hearing, and enjoined and prohibited all members of the class from prosecuting any action in any capacity asserting any claims which were proposed to be released pursuant to the settlement, pending final determination of the fairness of the settlement. (C.327-38).

Subsequently, Objectors sought leave to obtain discovery from the Class Representative, Class Counsel, Liberty National, its agents, employees and counsel, and others, bearing upon (1) the negotiations, discussions, discovery and actions or activities leading up to the settlement agreement, (2) the fairness and/or adequacy of the proposed settlement, and (3) the propriety of the class certification. (Filed with the trial court and identified on docket sheet as "Two (2) Briefs by Intervenor", see C.5969). Liberty National and Class Counsel opposed this request for leave to conduct discovery (C.560-93), and Class Counsel denied requests from Objectors' counsel to be permitted to review Class Counsel's files regarding discovery previously conducted and the basis of the settlement. (*Ex parte Eunice W. Long*, No. 1921852, *infra*, Brief in Support of Petition for Writ of Mandamus, Ex. S).

During a July 27, 1993 hearing on the request for leave to conduct discovery, the Circuit Judge orally ordered Class Counsel to (1) produce all documentation supplied to Class Counsel by Liberty National and relied upon by Class Counsel in evaluating the fairness of the Settlement proposal; (2) produce copies of transcripts of the three depositions taken by Liberty National; and (3) produce the actuarial expert retained by Class Counsel



for deposition. (Identified on docket sheet as "In Clayton . . . Open Court," see C.5970). The Circuit Judge, however, failed to rule on Objectors' requests to depose Class Counsel, the Class Representative, and counsel for and employees of Liberty National; to propound interrogatories and requests for production to Liberty National and the Class Representative; and to obtain production of Class Counsel's correspondence with counsel for Liberty National bearing upon the proposed settlement or any negotiations leading up to it. (*Id.*).

On August 3, 1993, Liberty National filed a notice of intent to mail class action notice and to publish summary notice, and motion for approval of the printed notice and their distribution and publication. (C.690). On that same day, without notice to Objectors, the Circuit Judge issued an order approving the printed notice, summary notice, and their distribution and publication. (C.729). Objectors filed several objections to the class notice and motions for hearings on the propriety of the class notice (C.731-41, 748-79, 796-812), but no hearings were granted and the class notice was distributed.

In September 1993, Objectors filed a petition for writ of mandamus with the Alabama Supreme Court seeking an order permitting the discovery Objectors had requested. (C.2299-300). The Circuit Judge filed an answer to the petition in which he requested that the Alabama Supreme Court address the issue of whether there can be a settlement binding absent class members without affording those class members the right to opt out of the class. (C.2301-03). The Alabama Supreme Court ordered that the Circuit Judge rule on the pending discovery requests, but did not reach the opt out issue.

*Ex parte Eunice W. Long*, No. 1921852. (C.2580-88). On November 2, 1993, four days after the ruling of the Alabama Supreme Court, and without any further hearing, the Circuit Judge issued an order denying Objectors any further discovery. (C.2567-69). The order also rescheduled the fairness hearing for November 18, 1994. (*Id.*).

In accordance with the Circuit Judge's order of June 16, 1994 (C.327-38), Objectors submitted objections to the class certification, class notice, denial of discovery, issuance of injunction and the settlement prior to the October 10, 1993. (C.1231-2288). On November 12, 1993, the Circuit Judge issued an order requesting briefs on the issues before the court and rescheduling the fairness hearing for January 20, 1994. (C.2757-58).

The fairness hearing was held on January 19-24, 1994. The evidence unequivocally established that Liberty National charged higher premiums for the new policies and that these additional premiums constituted out-of-pocket losses to class members. Class Counsel admitted that the Class Representative himself had suffered out-of-pocket loss in the payment of these higher premiums. (R.748-49). The extent of the out-of-pocket loss incurred by class members who had their policies exchanged from the payment of additional premiums for the new policies also was established through the evidence presented in the *McAllister* case, which was presented to the Circuit Judge. As noted above, not only were the new policies more expensive, Liberty National moved policyholders who had purchased their old policies when they were younger into different age bands for which higher premiums were charged based upon their age at the time of the exchange of their policy.

At the fairness hearing, Objectors also challenged, among other things, the adequacy of representation,<sup>9</sup> the "value" placed upon the settlement by Class Counsel and Liberty National, the breadth of the release and the release of Torchmark when there had been no discovery from Torchmark in regard to its involvement in the cancer exchange program and Torchmark was not named as a defendant. Although the terms of the release clearly encompass all claims arising out of the issuance of new cancer policies, for example the forgery of an application for a new policy, Class Counsel unequivocally testified at the fairness hearing that the settlement of this action was only intended to release claims for damages arising out of the fraudulent exchange of an old cancer policy with unlimited benefits for radiation, chemotherapy and prescription drugs, for a new policy which restricted or eliminated these benefits. (R.745).

After the fairness hearing, Liberty National, with Class Counsel's consent, filed a motion for an order certifying the class for settlement purposes pursuant to Rules 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2). (C.3583-88). There was no indication prior to or during the fairness hearing that class certification pursuant to Rule (b)(1)(A) or (b)(1)(B) would be considered by the Circuit Judge.

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<sup>9</sup> Even in a class certified pursuant to Rule 23(b)(3) with an opt out provision, courts have held that the adequacy of representation requirement is not met when the settlement makes "important judgments on how recovery is to be allocated among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." *Georgine v. Amchem Prods., Inc.*, 1996 WL 242442 at 16 (3d Cir. May 10, 1996).

On February 4, 1994, the Circuit Judge issued an order and judgment conditionally approving the settlement in which the Circuit Judge modified the proposed settlement by also certifying the class pursuant to 23(b)(1)(A) and 23(b)(1)(B). The order conditionally approving the settlement also increased the value of the Incidental Fund to \$2,000,000; increased the value of the Extra Contractual Fund to \$9,000,000; increased restitution to 150%; and postponed the premium freeze until the later of January 1, 1996, or one year after the Alabama Supreme Court entered a final order. The Circuit Judge agreed to approve the proposed settlement if these and other minor modifications were accepted by Class Counsel and Liberty National. (C.3679-691). Objectors filed several objections to this order. (C. 3725-738, 3800-812, 3853-866).

On February 15, 1994, Class Counsel filed a motion to modify the Circuit Judge's order and judgment conditionally approving the settlement. Class Counsel sought to have Torchmark, Liberty National's parent, deleted from the Release and to limit the claims being released only to those alleged in the amended complaint. (C.3705-713). On February 22, 1994, the Circuit Judge entered an order allowing Class Counsel to obtain certain discovery from Torchmark to determine its involvement in the cancer exchange program. (C.3716-718). The order restricted Objectors' participation in this discovery by permitting only two of Objector's attorneys, who were designated by the Circuit Judge, to attend the depositions and to "consult" with Class Counsel about the discovery. (*Id.*).



The Circuit Judge held a hearing on May 19, 1994, to consider all outstanding motions. At that time, the Circuit Judge allowed Objectors until May 26, 1994, to submit additional briefs, and Objectors filed a brief on May 26, 1994, in accordance with the court's order. (R.847-907). *On the same day*, Class Counsel and Liberty National filed a notice accepting the Circuit Judge's modifications to the settlement set forth in the February 4, 1994, order (C.5651-55, 5735-40),<sup>10</sup> and the Circuit Judge entered the Order and Final Judgment approving the Settlement (App. 93a) and issued Findings of Facts and Conclusions of Law. (App. 21a).

The Circuit Judge's Order and Final Judgment certified the class pursuant to Rules 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2); prohibited class members from opting out of the class action; required all class members to release any pending and future claims for compensatory and punitive damages; determined that the class notice, despite its complexity, complied with the requirements of due process and Rule 23; permanently enjoined any class member from participating as a litigant in any action that was part of the "Released Claims" as originally defined in the Settlement; and approved the Settlement, as modified by the court's February 4, 1994 order,

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<sup>10</sup> In accepting the settlement as modified by the Circuit Judge, Class Counsel allowed Liberty National and Torchmark to obtain an exceedingly broad release of all pending or future claims based upon tortious conduct or breach of duty in the sale of the new cancer policies prior to the settlement, which was contrary to Class Counsel's testimony that it was not his intent to release all such claims.

as being fair and just. (App. 93a-106a). Thereafter, Objectors timely filed their Notices of Appeal to the Alabama Supreme Court. (C.5754-5935).

On appeal, Objectors challenged the settlement of the action on a no opt out basis as violative of Objectors' constitutional rights to a trial by jury and due process. Objectors contested certification of the class pursuant to Rules 23(b)(2) and 23(b)(1)(A) and (B); the failure of the Circuit Judge to apply a higher level of scrutiny to the settlement under the circumstances; the Circuit Judge's abuse of discretion in approving the settlement, which was not fair, reasonable or adequate; and the Circuit Judge's abuse of discretion in denying Objectors' motions to conduct discovery as to the propriety of the class action and the fairness of the proposed settlement. On December 22, 1995, the Alabama Supreme Court issued an opinion affirming the Circuit Judge's order and final judgment. The Alabama Supreme Court held that the class was properly certified pursuant to Rules 23(b) and 23(b)(1)(A) and (B), that a "class action" without the right to opt out did not violate the right to trial by jury, that the Circuit Judge did not abuse its discretion in finding that the settlement was fair, adequate and reasonable, and that the Circuit Judge did not abuse its discretion in denying the discovery requested by Objectors. (App. 1a-20a).

In their Application for Rehearing, Objectors argued that the Alabama Supreme Court erred in (1) affirming the Circuit Judge's approval of the settlement of the class on the no opt out basis in violation of Objectors' constitutional rights to due process and a trial by jury on their damage claims for fraud; (2) affirming the Circuit Judge's



certification of the class pursuant to Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2); (3) affirming the Circuit Judge's approval of a class settlement on a basis which did not allow objectors' including nonresidents, to opt out in violation of their constitutional right to due process; (4) failing to address the Circuit Judge's refusal to give the requisite level of scrutiny to the settlement in light of the evidence that Liberty National itself desired class certification and that settlement negotiations were substantially complete prior to preliminary class certification; (5) concluding that the settlement adequately remedied class members' claims for the higher premiums they paid as the result of the cancer exchange program which was contrary to the evidence and the court's prior rulings in the *Boswell* and *McAllister* decisions; and (6) failing to address whether the limited discovery allowed by the Circuit Judge was in violation of the Objectors' rights secured by common law and the Alabama and United States Constitutions. By order of February 16, 1996, the Alabama Supreme Court overruled the application for rehearing without comment. (App. 108a).

#### REASONS FOR GRANTING THE PETITION

This petition is due to be granted because the decision of the Alabama Supreme Court herein deprives Objectors, who include nonresidents of Alabama, of their claims for monetary damages without due process of law. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985), this Court established that the due process rights of an absent plaintiff class member in a class action predominantly seeking a money judgment are satisfied if

the plaintiff receives reasonable notice, an opportunity to be heard and to meaningfully partake in the litigation, adequate representation, and "at a minimum . . . an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." Although this action clearly is one predominantly seeking a money judgment, Class Counsel and Liberty National, by characterizing the relief sought as primarily equitable and injunctive for settlement purposes and by improperly obtaining class certification pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B), have circumvented the due process requirements set forth in *Shutts*.

The Class Representative himself initially defined the action as one for money damages. The evidence is undisputed that each of the Objectors, regardless of whether he or she made a claim under a cancer policy, suffered monetary damages based upon the payment of higher premiums for the new policies which restricted or eliminated the unlimited benefits for radiation, chemotherapy and prescription drugs. The Alabama Supreme Court previously held in two other cases arising out of the same cancer policy exchange program that the payment of additional premiums for the new policies constituted damage sufficient to support a claim for fraud. See *Boswell v. Liberty Nat'l Life Ins. Co.*, and *McAllister*, *supra* at Note 3. Both the Circuit Judge and Alabama Supreme Court nonetheless accepted the characterization of Class Counsel and Liberty National of the relief sought as being "primarily equitable and injunctive" in the context of the settlement, which Class Counsel and Liberty National negotiated. (App. 12a).

The Alabama Supreme Court missed the mark when it simply noted that, because the settlement of a class certified pursuant to Rules 23(b)(1) or 23(b)(2) may ultimately result in an award of money damages, certification pursuant to Rules 23(b)(1) and 23(b)(2) is not precluded. (App. 12a).<sup>11</sup> The issue is not whether it is possible to obtain monetary relief as well as equitable or injunctive relief in a class action properly certified under Rule 23(b)(2) or 23(b)(1), but whether it is a violation of due process for class counsel and a defendant to mischaracterize an action which is predominantly for money damages as primarily equitable in the context of a class settlement to avoid providing class members the opportunity to exclude themselves from the class, which due process unquestionably requires.

Attempts to ignore damage claims and focus solely on injunctive relief for purposes of certification under Rule 23(b)(2) have been rejected with regularity. See, e.g.,

<sup>11</sup> Neither of the cases cited by the Alabama Supreme Court in support of this proposition, *First Alabama Bank, N.A. v. Martin*, 425 So. 2d 415 (Ala. 1982), cert. denied, 461 U.S. 938 (1983), and *White v. National Football League*, 822 F.Supp. 1389 (D.Minn. 1993), aff'd, 41 F.3d 402 (8th Cir. 1994), cert. denied, \_\_\_ U.S. \_\_\_, 115 S. Ct. 2569 (1995), are analogous to the instant case. In *First Alabama Bank, N.A. v. Martin*, a suit in equity to enforce a trust, the court ordered the trustee to repay funds to the trust and none of the class members had any out-of-pocket loss. In *White v. National Football League*, an antitrust action by football players seeking free agency, plaintiffs clearly sought primarily equitable and injunctive relief, and although money damages were also awarded, the appellate court specifically did not reach the issue of whether the trial court could certify a non opt out class in an action brought pursuant to Rule 23(b)(1). 41 F.3d at 408.

*Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *Freedman v. Arista Records, Inc.*, 137 F.R.D. 225 (E.D. Pa. 1991); *Zanni v. Lippold*, 119 F.R.D. 32, 35 (C.D. Ill. 1988); *In re Asbestos School Litig.*, 104 F.R.D. 422, 438-439 (E.D. Pa. 1984), modified on other grounds, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852 (1986) and 479 U.S. 915 (1986); *In re Arthur Treacher's Franchise Litig.*, 93 F.R.D. 590 (E.D. Pa. 1982).

For example, the plaintiffs in *In re Asbestos School Litigation* sought Rule 23(b)(2) treatment for claims seeking injunctive relief for removal and monitoring asbestos abatement already undertaken. In denying Rule 23(b)(2) certification, the court stated:

Despite the ingenuity of plaintiffs' claims for equitable remedies, this case remains at bottom, one for legal damages. The Advisory Committee Notes to Rule 23(b) states (sic) that "[t]he [(b)(2)] subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." 39 F.R.D. at 102.

*In re Asbestos School Litig.*, 104 F.R.D. at 438.

Focusing on the claims or rights class members are required to release in a settlement, rather than the parties' characterization of the remedy in the pleadings, is a clear means of determining whether an action is predominantly for a money judgment. As stated in *Raskin v. Birmingham Steel Corp.*, No. Civ.A. 11365, 1990 WL 193326 (Del. Ch. Dec. 4, 1990), where the court rejected a purported settlement of a Rule 23(b)(2) class action because the claim was primarily for money damages,



... in assessing whether a case is one "wholly or predominantly for a money judgment" (thus precluding (b)(2) treatment) it is necessary to consider not simply the claims asserted in the complaint, but also those that will be barred by *res judicata* effect of a judgment or, in the context of a settlement, those that are to be released. (Emphasis added.)

See also Herbert B. Newberg and Alba Conte, *Newberg on Class Actions* § 12.17 (3d ed. 1992).

Here, not only are the claims asserted in the complaint for money damages, but the settlement requires class members to surrender their fraud claims for compensatory and punitive damages. Analyzing whether the action is "wholly or predominantly for a money judgment" from the perspective of what the settlement requires these class members to give up establishes unequivocally that the action is predominantly for money damages. Class Counsel and Liberty National, with the acquiescence of the Circuit Judge, self-servingly mischaracterized the action as one which is primarily equitable or injunctive for the purpose of thwarting the right of class members to opt out of the settlement negotiated by Class Counsel and Liberty National.

The Circuit Judge's certification of this action pursuant to Rules 23(b)(1)(A) and 23(b)(1)(B) similarly is contrary to the facts and the law. Rule 23(b)(1)(A) provides that a class action is maintainable under this section if a separate action would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class."

The law is clear that the mere fact that some plaintiffs may be successful in lawsuits against a defendant, while others may not, is not a ground for invoking Rule 23(b)(1)(A). See *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984); *McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist.*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 724-25 (E.D.N.Y. 1983), *petition for mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). Objectors' primary claims are for money damages and the Circuit Judge's other findings in this case regarding Rule 23(b)(1)(A) (C.3626), do not support its conclusion that certification under Rule 23(b)(1)(A) is appropriate.

The problems with certification of this class under Rule 23(b)(1)(B) are even more egregious. This rule allows for certification where adjudications by individual class members "would as a practical matter be dispositive of the interests of the other members [of the class] not parties to the adjudications. . . ." While cases have held that a "limited fund" theory is a justification for a class action under Rule 23(b)(1)(B), the Circuit Judge failed to comply with the required procedure under Rule 23(b)(1)(B), which mandates that Objectors be given an opportunity to dispute whether there was a limited fund. As a matter of law a trial court must conduct a fact-finding inquiry on the question of whether there is a limited fund and allow the opponents of class certification to present evidence that a limited fund does not exist. See *In re Bendectin Prods. Liab. Litig.*, 749 F.2d at 306; *In re Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir.



1982), *cert. denied*, 459 U.S. 1171 (1983); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 727.

Critically, there was *no notice* that the Circuit Judge intended to consider whether this case should be certified pursuant to Rule 23(b)(1)(B) until *after the fairness hearing*. Objectors were given no notice that they should present evidence to refute a limited fund theory and certainly were not given any opportunity to conduct discovery from Liberty National on this issue.

Moreover, the law requires specific findings regarding the defendant's financial status in a limited fund case. See *In re Bendectin Prods. Liab. Litig.*, 749 F.2d at 306. Here, the only finding the Circuit Judge made in regard to Liberty National's financial status was that the statutory net worth of Liberty National is \$326 million. (C.3626). The Circuit Judge further found, without any evidentiary support, that the assets making up the "statutory net worth" was a limited fund which would be subject to depletion if Class Members were allowed to sue Liberty National individually. (C.3626).

The Eleventh Circuit Court of Appeals held a similar finding of a limited fund on the basis that some investors might bankrupt potential sources of recovery insufficient in *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987). There was no specific inquiry into Liberty National's financial status at the fairness hearing and Objectors certainly had no opportunity to introduce evidence in opposition.

Certification of this class pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23 (b)(1)(B) clearly was contrary to the facts and the law. Assuming *arguendo*, however, that the

action could have been certified properly pursuant to either Rules 23(b)(2), 23(b)(1)(A) or 23(b)(1)(B), the opinion of the Alabama Supreme Court herein affirming mandatory certification pursuant to Rules 23(b) and 23(b)(1) with no opt out when monetary damages are awarded to certain class members in the settlement is contrary to the decision of the Eleventh Circuit Court of Appeals in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983). Recognizing the importance of providing an opt out in an action certified pursuant to Rule 23(b)(2) when class members have unique claims for monetary damages, the Eleventh Circuit stated

[o]bjectors to this settlement proposal moved in the district court that opt out procedures be established for class members dissatisfied with the monetary aspects of the proposed settlement. The district court denied the motion, concluding that the fairness hearing provided the objectors 'a means of litigating all of their individual claims, including claims for higher back pay, or for back pay, or any other individual relief.' *Because many monetary claims in cases are unique to individual class members, we hold that the right to opt out of the class, normally accorded only to members of classes certified under Rule 23(b)(3), must be extended to all members of this (b)(2) class.* (emphasis added).

*Holmes*, 706 F.2d at 1151-52.

The settlement provides monetary compensation for certain class members, including a few of the Objectors, who suffered cancer and made claims for radiation, chemotherapy and out-of-hospital prescription drugs under

their new policies. Regardless of whether a class is certified under Rule 23(b)(1), (b)(2) or (b)(3), due process requires that, when *any monetary damages* are paid in a class settlement, class members be afforded the right to opt out. (*Id.*). As one commentator has stated:

Whenever unliquidated damages are sought for individual injuries suffered, whether sought as the primary or ancillary relief, then such claims are necessarily uncommon with the class representative's claims. As a matter of procedural due process, the class representative cannot litigate to a judgment binding on class members for unliquidated damages, over objection. Accordingly, when unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter, regardless under which Rule 23(b) category the class may be certified. Mass tort plaintiffs may seek to have the same class certified under different sections of Rule 23(b) for different counts, *e.g.*, a Rule 23(b)(2) class for a nuisance abatement count and a Rule 23(b)(3) class for a money damages count.

H.B. Newberg and A. Conte, *Newberg on Class Actions* § 17.16 (3d ed. 1992).

Objectors' due process right to opt out of a class action in which they are required to release their individual monetary damage claims clearly has been violated here by the certification of a mandatory class pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B). Moreover, even assuming that the action could have been certified properly under Rule 23(b)(2) or 23(b)(1), the failure to

afford Objectors the right to exclude themselves from the class when monetary damages are being awarded to certain class members conflicts with authority in the Eleventh Circuit Court of Appeals which requires that, under such circumstances, the right to opt out be afforded even though the class has been certified pursuant to Rule 23(b)(2) or 23(b)(1).

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### CONCLUSION

This case demonstrates how the class action procedure can be manipulated to trample the due process rights of the victims of a mass tort by depriving them of the right to opt out of a class action which precludes them from pursuing a trial by jury to seek adequate compensation for the monetary damages they have suffered. This case, and the misuse of the class action procedure evidenced thereby, cries out for review and correction by this Court.

Respectfully submitted,

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### APPENDIX

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

### SUPREME COURT OF ALABAMA

OCTOBER TERM, 1995-96

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1931603

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Guy E. Adams, et al.

v.

Charlie Frank Robertson and  
Liberty National Life Insurance Company<sup>1</sup>

Appeals from Barbour Circuit Court  
(CV-92-021)

KENNEDY, JUSTICE.

This is an appeal by approximately 400 objecting class members (hereinafter "Objectors") from a judgment

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<sup>1</sup> The following cases are all decided by this opinion: 1931604 - Thomas Beck, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931605 - David Cox, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931606 - Vernon E. Adamson, Sr., et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931607 - Darlene Skinner, et al. v. Charlie Frank



based on a class action settlement regarding cancer insurance policies.

Liberty National Life Insurance Company began selling cancer insurance policies (hereinafter referred to as "old policies") in the 1960's. The policies provided unlimited coverage for radiation, chemotherapy, and prescription drugs to fight cancer. Specifically, the policies covered the costs of radiation and chemotherapy, whether it was done on an inpatient basis or on an outpatient basis. Also, the policies provided coverage for drugs and medicine administered outside the hospital, including pain and anti-nausea medications. As long as the policyholder paid the premiums, the cancer policies could not be canceled and were guaranteed renewable for the life of the policyholder.

According to the objectors, in late 1986 Liberty National began a cancer policy exchange program

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Robertson and Liberty National Life Insurance Company; 1931610 - David L. Lynd, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931611 - Lucille Williams, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931612 - Opal M. Soesbe v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931613 - John Henry Lamey, Jr., et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931614 - Douglas C. Hammac, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931615 - Artemus Lane Nobles, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; 1931616 - Florence W. Clayton, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company; and 1931617 - Larry L. Andrews, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company.

whereby its agents attempted to persuade those with the old policies to switch to the new policies. The new cancer policies contained some benefits not included in the old policies, such as a first-occurrence benefit, hospice care, and dread disease benefits. However, the new policies contained severe limitations on coverage in comparison to the old policies. Radiation and chemotherapy benefits were each limited to \$500 a day. Prescription drugs covered under the new policies were limited to certain "cancer fighting" prescription drugs, while pain and anti-nausea drugs were no longer covered. Outpatient chemotherapy benefits were limited to \$8,000 a year.

Liberty National denied the allegations about "switching" policies and contended that the new policies provided substantially greater overall coverage than the old policies and that the new policies have paid substantially greater sums in benefits to those who were diagnosed with cancer.

Liberty National had approximately 400,000 customers with the old policies. The objectors contend that those customers who switched from an old policy to a new policy did so based upon a pattern and practice of fraud perpetrated by Liberty National.

On May 12, 1992, Charlie Frank Robertson sued Liberty National, alleging that it had fraudulently caused loans to be made against his *life* insurance policy. On October 2, 1992, the complaint was amended to add new allegations concerning a pattern and practice of fraud that caused approximately 200,000 holders of old cancer policies to exchange their policies for new cancer policies. The amended complaint sought equitable and legal relief

for all the policyholders by virtue of a class action, with Robertson as a class representative. Following a hearing, a class was certified. Robertson's original life insurance claim was subsequently settled.

Certain policyholders filed objections to their inclusion in the class. Two different groups of objectors also filed their own class actions involving the cancer policy exchange programs. These class actions were stayed by this Court because where two or more courts have concurrent jurisdiction the one that takes cognizance of the action first retains exclusive jurisdiction until a final determination. *Ex parte Liberty Nat'l Life Ins. Co.*, 631 So.2d 865 (Ala. 1993).

Liberty National and counsel for the class began settlement negotiations. On June 16, 1993, Liberty National and the class representatives entered into a settlement agreement. The trial court preliminarily approved the settlement, subject to notice to the class and an opportunity for the objectors to present their objections to the settlement at a fairness hearing.

In August 1993, notice of a class action was mailed to the more than 400,000 policyholders. The notice included a copy of the settlement agreement and advised the class members of their right to object and be heard. Approximately 1,000 of the 400,000 class members filed objections to the settlement.

A fairness hearing was held on January 20, 1994. The trial court heard oral testimony, and written materials were also submitted. On February 4, 1994, the trial court entered an order conditionally approving the settlement so long as the parties agreed to certain court-imposed

modifications to the settlement. The trial court stayed its order pending certain objectors' concerns over releasing Liberty National's parent company, Torchmark Corporation, and allowed the objectors to have additional discovery.

On May 19, 1994, the trial court held a final hearing concerning the proposed settlement. On May 26, 1994, the trial court entered its findings of fact and conclusions of law in a 67-page memorandum and made the order final. (C.R. 5656-5721, 5722-34.) Approximately 400 objectors appealed.

The objectors argue that the trial court abused its discretion in denying the objectors the right to a jury trial on their claims against Liberty National. Specifically, the objectors claim that their constitutional right to a trial by jury was violated when the trial court failed to allow them to "opt out" of participating in the class action settlement. An opt-out provision would allow the objectors to pursue their own individual lawsuits against Liberty National based on the same claim.

At the outset, we note that Rule 23 of the Alabama Rules of Civil Procedure reads the same as Rule 23 of the Federal Rules, and we consider federal case law on class actions to be persuasive authority for the interpretation of our own Rule 23. See, *First Alabama Bank of Montgomery, N.A. v. Martin*, 381 So.2d 32 (Ala. 1980).

A class action is a procedural device created solely for the purposes of litigation. The goal of a class action is to provide a simple and efficient way for processing numerous interrelated claims. A class action allows one or more persons, known as class representatives, to sue



on behalf of the many persons who have the same, or similar, questions of law or fact as the representatives.

Under Rule 23(a), A.R.Civ.P., certain prerequisites must be met in order for one to proceed with a class action: (1) the class must be so numerous that joinder is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the class representatives must be typical of the claims or defenses of the class; and (4) the class representatives must be able to fairly and adequately protect the interests of the class. It is undisputed that the prerequisites have been met in this case.

Once the prerequisites are met, the class action must fit within one of the types of classes described in Rule 23(b).

Rule 23(b)(1) provides that a class action may be maintained if

"the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . . ."

A class action may be maintained under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

A class action under Rule 23(b)(3) is appropriate when

"the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Rule 23(b)(1)(A) class actions involve those classes formed if the prosecution of separate lawsuits would create the risk of inconsistent adjudications. A classic example would be separate lawsuits by individuals against a municipality concerning a bond issue, some individuals wishing to invalidate the issue, others to limit it, and still others to enforce interest payments under the bonds. Larry L. Teply & Ralph U. Whitten, *Civil Procedure*



689 (1994). If one group succeeded in invalidating the bond issue and another succeeded in getting judgments ordering payment of the interest, the municipality would have incompatible standards with regard to the bond issue. Another example of a situation suggesting a Rule 23(b)(1)(A) class action would be where individual lawsuits concerning the rights and duties of riparian landowners could result in inconsistent rulings. Rule 23, F.R.Civ.P. Advisory Committee Notes. There would be a substantial risk of different results if each owner of land along the river were allowed to bring a separate lawsuit regarding water rights.

Rule 23(b)(1)(B) class actions should be maintained if adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of other members or substantially impair the ability of the other members to protect their interests. An example would be where some shareholders seek to force a corporation to declare a dividend. *Teply & Whitten, Civil Procedure* 690. If the plaintiff shareholders won, then the judgment would be dispositive of the interests of the remaining shareholders.

A class action under Rule 23(b)(2) is permitted when the party opposed to the class has acted or refused to act on grounds applicable to the entire class. Generally, injunctive relief and declaratory relief are the remedies under this type of class action. An example would be where a person was accused of unlawful discrimination against an entire class of people.

Rule 23(b)(3) allows class actions when there are common questions of law or fact among the class members and forming a class is superior to other methods of ending the legal dispute in a fair and efficient manner, e.g., when joinder of parties would be impracticable because of the large numbers of parties involved. Typically, the relief demanded is damages, and typical examples of a Rule 23(b)(3) class would be lawsuits involving consumer rights or antitrust violations. Typically, a Rule 23(b)(3) class is less cohesive than the other types of classes.

We note that in a class action brought under Rule 23(b)(3), the members of the class are entitled to "opt out" of the class action and pursue a separate lawsuit. See Rule 23(c). Class members in a Rule 23(b)(1) or 23(b)(2) lawsuit do not have the choice of opting out of the class action.

In the instant case, the trial court found that class action certification could be proper under Rule 23(b)(1)(A), Rule 23(b)(1)(B), or Rule 23(b)(2). The objectors argue that the class should have been formed under Rule 23(b)(3) and, accordingly, that they should be allowed to opt out of the class to pursue their own individual lawsuits.

The first issue then is whether the class was properly certified pursuant to Rule 23(b). With regard to class certification, the trial court made certain findings of fact. The trial court's findings were made on the basis of ore tenus evidence and will not be disturbed on appeal unless there is a clear showing that the findings are plainly and palpably wrong, with no evidence to support

them. *Water Works & Sewer Bd. v. Wingett*, 646 So.2d 1331 (Ala. 1994); *First Alabama Bank, N.A. v. Martin*, 425 So.2d 415 (Ala. 1982), cert. denied, 461 U.S. 938 (1983). Additionally, class certification is generally left to the sound discretion of the trial court. *Ex parte Gold Kist Inc.*, 646 So.2d 1339 (Ala. 1994).

With regard to class certification, the trial court found, in pertinent part, that the class consisted of all persons who now are or in the past had been insured under any cancer policy that was issued by Liberty National on or before August 29, 1986, and that provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits and that was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, had thereafter lapsed, or had been replaced by a different Liberty National cancer policy after that date, except those already parties to a lawsuit based on these same facts unless the lawsuit was voluntarily dismissed prior to the settlement. Specifically excluded from the class was any Liberty National insured whose "old" cancer policy had lapsed before August 29, 1986, unless the insured had paid delinquent premiums and the policy had been reinstated, and any Liberty National insured whose first cancer policy was a new policy issued after August 29, 1986.

The remedies available to the class under the settlement were: (1) an injunction prohibiting the institution or continuation or any cancer policy "exchange" program and prohibiting any future practice of exchanging or substituting cancer policies with diminished benefits

without full disclosure to the policyholder; (2) full restitution of monetary benefits lost as the result of monetary limits or elimination of coverage contained in the replacement policies for those class members who actually contracted cancer and whose benefits were affected; (3) reformation of all "new" policies currently in force to eliminate monetary limitations on radiation, chemotherapy, and prescription chemotherapy drugs and the exclusion of other out-of-hospital prescription drugs used in the treatment of cancer, whether or not the class member has suffered monetary loss; (4) an injunction against denying otherwise valid future claims under the new policies on the basis of the challenged monetary limits or exclusion of benefits; (5) reinstatement of lapsed policies prospectively without evidence of insurability and without payment of back premiums; (6) an injunction against any increase in premiums before January 1, 1996, or one year from the date of the final order of the court; and (7) an injunction requiring common pooling for all rate filing purposes.

The trial court found that a class could be maintained under Rule 23(b)(2), because it found Liberty National had acted on grounds generally applicable to the class, thereby making equitable and injunctive relief appropriate. The trial court also found that there was a risk of inconsistent results that would impair Liberty National's ability to pursue a uniform course of conduct and that a Rule 23(b)(1)(A) class therefore would be maintainable. The trial court found that a class action could be maintained under Rule 23(b)(1)(B) because, it found, individual adjudications would be dispositive of the interests of other members not parties to the individual actions or



would substantially impair the rights of the class members to protect their interests.

The objectors argue that the class should be certified under Rule 23(b)(3) because, they say, the relief requested is primarily monetary. They contend that the defendants are attempting to couch their damages claims as injunctive relief. Accordingly, the objectors argue that Rule 23(b)(3) is the appropriate type of class action and that under Rule 23(b)(3) they should be allowed to opt out of participating in the settlement, in order to bring individual lawsuits.

First, we note that simply because a Rule 23(b)(1) or (b)(2) class action settlement may ultimately result in an award of money damages does not prevent class certification under those subdivisions. *Martin*, 425 So.2d at 415. So long as the relief sought is *primarily* equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper. *White v. National Football League*, 822 F.Supp. 1389 (D. Minn. 1993), *aff'd* 41 F.3d 402 (8th Cir. 1994), *cert. denied*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 2569 (1995). Nothing in Rule 23 forbids monetary relief when the action is brought under Rule 23(b)(2). *Forebush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993).

The relief awarded in the instant case included an order preventing Liberty National from switching new policies for old policies without informing the insureds of the diminished benefits. Also, Liberty National was ordered to reform the "switched" new policies to include the benefits that had been provided in the old policies. Tellingly, the objectors point out in their brief that of the

400,000 class members, of whom 206,000 had policies fraudulently switched, less than 700 class members received actual money damages. "In other words, less than 1/4 of 1% of the class received money damages under the settlement." (Objectors' brief p. xxii.)

We note that simply because equitable relief has a "value" based on money or has "worth" does not make it monetary relief. For example, if a person is ordered to execute a conveyance of land based on a contract, the land has a money "value," although the relief granted is equitable, i.e., equity acts on the person, by compelling him to fulfill his contract. In this case, the "reformed" policies have an increased "value" to the insureds, but the relief granted was forcing Liberty National to restore the benefits. More importantly, the benefits of a reformed policy are not enforceable unless the insured contracts cancer.

The objectors also argue that the trial court's certification of the class without an opt-out provision violates their right to trial by jury under § 11 of the Alabama Constitution, i.e., that the objectors were deprived of their day in court because the settlement agreement did not provide them a means of opting out of the class in order to pursue their own lawsuits.

In support of their argument, the objectors cite *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991), and *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993). In *Moore* and *Henderson*, this Court struck down legislative limits or "caps" on compensatory and punitive damages, respectively, as violating the right to trial by jury. The objectors contend that in this case the violation of the



right to trial by jury is more egregious than those violations in *Moore* and *Henderson*, where mere limits were placed on the amount a jury could award, in comparison with this case where the right to a jury trial has been eliminated.

We disagree with the objectors' contention that a class action that does not have an opt-out provision is a violation of the right to trial by jury. As stated earlier, a class action is a device created solely for the purposes of litigation. The class action was created to enable a lawsuit to proceed where the number of those interested was too great to permit joinder. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985). The modern class action follows the same goal, allowing an action when there are common claims and too many parties for proper joinder.

Only those chosen as class representatives will actually be in the courtroom; however, all class members are "having their day in court" through the representative. Those class members who are absent from the courtroom are bound by the judgment, so long as the absent members were adequately represented by the class representatives, represented by a qualified attorney, provided with adequate notice of the proposed settlement, and given an opportunity to object to the settlement. The trial judge must then approve the settlement after analyzing the facts and the applicable law and considering any objections to the settlement. So long as these procedures are followed, courts hold that the absent class members have had their day in court. Therefore, we hold that a class action without an opt-out provision does not violate the Alabama Constitution.

Implicitly, this Court has held that class actions without an opt-out provision do not violate the right to trial by jury. In *Martin*, 425 So.2d at 417, we held that the fact that a class action may ultimately result in a monetary recovery does not prevent certification under Rule 23(b)(1) or (b)(2).

According to the objectors, a class action brought under Rule 23(b)(1) or (b)(2) would be unconstitutional because those sections include no opt-out provision. The objectors' argument is that a rule of procedure cannot be applied so as to defeat a state constitutional right. By the objectors' rationale, other procedural mechanisms that prevent a jury trial, such as a motion to dismiss for failure to state a claim, a judgment on the pleadings, a summary judgment, and a directed verdict would also violate § 11. We cannot agree with that rationale.

Because the objectors' argument concerning proper certification is based on their desire to opt out of the class, we need not address whether the class would be more appropriately certified under Rule 23(b)(1) or 23(b)(2). We leave this to the trial court's discretion.

The next issue we must address is the trial court's approval of the settlement. The objectors contend that the settlement inadequately compensates the class – specifically, they argue that each class member should be able to seek compensatory and punitive damages for fraud. First, the objectors argue that they should be entitled to compensatory relief for having allegedly paid higher premiums on the new policies. However, the new policies contained benefits that were not part of the old policies, and the settlement adequately remedies the problem by

requiring Liberty National to reform the new policies to include the benefits that had been provided in the old policies. Also, there is a freeze on premiums for one year after final approval of this settlement and no valid future claims can be denied based on the benefits excluded in the new policies.

The objectors contend that they should be entitled to funds set up by the settlement to benefit those who contracted cancer, submitted claims, and received less in benefits under the new policies that they would have received under the old policies. The trial court expressly found the assessment of the funds to be punitive in nature. The objectors argue that they should be entitled to share in these funds, because, they argue, Liberty National has not been sufficiently punished for its wrongdoing. However, the objectors failed to argue in their briefs that any of them had contracted cancer, had submitted claims, and had received less in benefits from the new policies.

There can be no settlement without the trial court's approval. Rule 23(e). Requiring the trial court's approval of the settlement protects the class from unjust settlements or voluntary dismissals. The burden is on the proponents of the settlement to show that it is fair, adequate, and reasonable. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). This Court's standard of review is to determine whether the trial court abused its discretion. Great weight is given to the trial court's views, because that court has been "exposed to the litigants, and their strategies, positions, and proofs." *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971).

After thoroughly reviewing the trial court's findings of fact and conclusions of law and the order and final judgment, we cannot say that the trial court abused its discretion in finding that the settlement was fair, adequate, and reasonable. We attach those findings and the final order as an appendix to this opinion.

We note that the trial court gave due consideration to the following factors, among others, in approving the settlement: (1) the likelihood of success at trial (including the likelihood of establishing liability on the part of Liberty National); (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which the settlement is fair, adequate, and reasonable; (4) the complexity, expense, and duration of the litigation; (5) the substance and amount of opposition to the settlement; (6) the stage of the proceedings at which the settlement was achieved; and (7) the financial ability of Liberty National to withstand a greater judgment and the potential for a judgment or judgments in an amount or amounts likely to trigger the Due Process considerations (as recognized in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1986)) relating to punitive damages. See, *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); and *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir. 1974), cert. denied, 419 U.S. 900 (1974). Another factor considered by the trial court was whether proper notice was given. (See pp. 7 and 24-25 of trial court's findings of fact.)

In reviewing the trial court's findings and order, we find particularly interesting the fact that less than 1,000 class members, out of 400,000 (less than 1%) objected to the settlement. Courts have affirmed settlements when



substantially larger numbers of the class had objected. See, e.g., *Huguley v. General Motors Corp.*, 999 F.2d 142 (6th Cir. 1993) (settlement with no opt-out provision approved over objections by 15% of the class); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) (settlement approved over objections of a majority of the class representatives); *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982) (approving settlement over objections of a majority of the class); *Reed v. General Motors Corp.*, 703 F.2d 170 (5th Cir. 1977) (settlement approved with 600 of 1469 class members objecting).

The last issue raised by the objectors is whether the trial court abused its discretion in "denying [the] objectors' motions to conduct discovery as to the propriety of the class action and the fairness of the settlement." (Objectors' brief at p. 64.)

At the outset of our discussion of this issue, we note that the trial court has broad authority to limit or prohibit discovery by objectors. *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983). "There is no requirement that every objector be allowed to have discovery concerning the settlement itself so that he can personally assure its reasonableness. Such a course would mean that few settlements would be approved, since each member of the class would have the right to keep it open until satisfied. . . ." *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64 (S.D.N.Y. 1976), aff'd, 556 F.2d 682 (2d Cir. 1977).

When courts allow objectors to obtain limited discovery, it must be carefully balanced against the risk that full-blown discovery could injure the class as a whole by

threatening the settlement and running up costs. *Grinnell Corp.*, 495 F.2d at 463-64.

In this case, the trial court did, in fact, *allow* limited discovery. Counsel for the objectors had access to discovery conducted by class counsel and to discovery conducted by the Mobile law firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, where the same allegations were made against Liberty National in a separate lawsuit. The objectors were also allowed to depose the actuarial expert for the class and were allowed to participate in depositions concerning Liberty National's parent company, Torchmark Corporation.

Specifically, the objectors argue that they should have been allowed to depose class counsel in order to determine if there was evidence of collusion in the settlement. First, we note that if the trial court finds that the settlement is fair and reasonable, that the court may assume that the negotiations were proper. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982). Also, class counsel testified at the fairness hearing and was cross-examined at length by counsel for the objectors. We point out that, in theory, no class action "would ever be settled so long as there was at least a single lawyer around who would like to replace class counsel and start the case anew." *Grinnell Corp.*, 495 F.2d at 463-64.

Based on the foregoing, we affirm the judgment of the trial court.

1931603 - AFFIRMED.

1931604 - AFFIRMED.



1931605 - AFFIRMED.

1931606 - AFFIRMED.

1931607 - AFFIRMED.

1931610 - AFFIRMED.

1931611 - AFFIRMED.

1931612 - AFFIRMED.

1931613 - AFFIRMED.

1931614 - AFFIRMED.

1931615 - AFFIRMED.

1931616 - AFFIRMED.

1931617 - AFFIRMED.

Hooper, C. J.,\* and Maddox, Houston, Ingram, and Cook, JJ., concur.

Shores and Butts, JJ., recused.

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\* Although Chief Justice Hooper was not a member of this Court when this case was orally argued, he has listened to the tape of that oral argument.

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# APPENDIX

## IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA CLAYTON DIVISION

CHARLIE FRANK	)	
ROBERTSON, individually	)	
and on behalf of a class,	)	CIVIL ACTION NO.
Plaintiffs,	)	CV-92-021
	)	
v.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant.	)	

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to an Order with Respect To Proposed Settlement entered June 16, 1993, ("Order"), this class action was certified pursuant to Rule 23(b)(2), A.R.Civ.P., was set for hearing, and, by subsequent orders, scheduled to be heard on January 20, 1994, with respect to, among other things, (a) whether a proposed settlement of this action on the terms and conditions set out in the Stipulation and Agreement of Compromise and Settlement executed June 16, 1993 (hereafter "Stipulation" or "Settlement Agreement"), attached to the Order preliminarily approving the settlement is fair, reasonable, and adequate and should be finally approved by this Court, and (b) whether this Court should enter a final judgment approving the settlement, dismissing this action, and enjoining and prohibiting the filing of further litigation with respect to or based on the "Released Claims" as defined in the Stipulation.

After individual and published notice to class members, and an opportunity to submit objections, arguments, and evidence in support of or in opposition to the proposed settlement, a Fairness Hearing was held on January 20, 21 and 24, 1994.

On February 4, 1994, this Court entered an Order Conditionally Approving Class Action Settlement, the full text of which is incorporated herein by reference. The findings and conclusions set forth in that Order are hereby reaffirmed, and made final, the named parties and their counsel having notified the Court of their acceptance of the modifications to the class action settlement set forth therein. Pursuant to said Order of February 4, 1994, the class action certification pursuant to Rule 23(b)(2) was reaffirmed and the class action was additionally certified pursuant to Rule 23(b)(1)(A) and Rule 23(b)(1)(B) for purposes of settlement.

On February 22, 1994, this Court entered an Order directing certain discovery on the issue of whether defendant Liberty National Life Insurance Company's parent, Torchmark Corporation, had any active involvement in the alleged exchange of cancer policies by its subsidiary. That discovery has now been completed and the parties and objectors have had a full and fair opportunity to present evidence on this and related issues to the Court.

A. R. Civ. P. 23(e) requires judicial approval of all class action settlements, but does not provide any standards for the approval of a settlement. "Decisional law, however, provides [courts] with a general measuring rod for considering settlements: in determining whether to approve a proposed settlement the cardinal rule is that

the . . . Court must find that the settlement is fair, adequate and reasonable." *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 207 (1981), citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Determining the fairness of the settlement is left to the sound discretion of the trial court. See *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984, citing *Cotton*, 559 F.2d at 1330. See also *In re U. S. Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992); *Holmes v. Continental Can Company*, 706 F.2d 1144 (11th Cir. 1983); *Young v. Katz*, 447 F.2d 431, 432 (5th Cir. 1971).

The court in reviewing the fairness of a settlement is authorized to make a determination as to whether or not to approve the proposed settlement, or it may make suggestions to the parties for modifications of the settlement proposed. See *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977).

The 11th Circuit in *Bennett*, 737 F.2d at 986 (following the lead of the 5th Circuit in *Cotton*, 559 F.2d at 1330-1331), established a six-factor analysis to guide the trial court's determination that a settlement is fair, adequate and reasonable. Similar factors were established in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974); and *Bryan v. Pittsburg Plate Glass Co.*, 495 F.2d 799 (3rd Cir. 1974), *cert. denied*, 419 U.S. 900 (1974).

In weighing these factors, the trial court does not have "the right or duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *Cotton*, 559 F.2d at 1330, citing *City of Detroit v. Grinnell Corp.*, 495 F.2d at 456. Judicial evaluation of a proposed settlement of a class action thus involves a

limited inquiry into whether the possible awards of litigation with its risks and costs are outweighed by the benefits of the settlement. See *Grinnell*, 495 F.2d at 462, citing *Young v. Katz*, 447 F.2d at 433; accord, *Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414, 424-26 (1986).

Judicial evaluation is guided by public policy which strongly favors the pretrial settlement of class action lawsuits. See e.g., *In re U. S. Oil and Gas Litigation*, 967 F.2d at 493, citing *Cotton*, 559 F.2d at 1331. The Court's "judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett*, 737 F.2d at 986, citing *United States v. City of Miami*, 614 F.2d 1322, 1344 (5th Cir. 1980). This judicial policy favoring settlement is particularly important in the context of class actions. *Cotton*, 559 F.2d at 1131; *Zimmerman v. Bell*, 800 F.2d 386, 391 (4th Cir. 1986).

These factors and principles have been fully considered by the Court, and as further discussed herein, fully support the approval of this class action settlement.

## I. FINDINGS OF FACT

1. *Summary of the Proceedings and The Record.* In reaching its findings and conclusions herein, the Court has given great weight to its observations regarding the credibility, demeanor and substance of the live testimony presented at the Fairness Hearing. At the three-day hearing which commenced January 20, 1994, and continued on January 21 and 24, 1994, the following witnesses testified and presented evidence before the Court, in addition

to their sworn testimony in the form of affidavits (including some supplemental and rebuttal affidavits): John S. Moyse, Richard H. Gill, Jere L. Beasley, Anthony McWhorter, Thomas E. Hamby, Robert Dobson, Kristie Sayre, William O'Dell, Robert I. Stewart, John W. Miller and Plaintiff/Class Representative Charlie Frank Robertson. The following additional witnesses appeared and testified in open court at the Fairness Hearing: William C. Barclift, III, Champ Lyons, Jr., Ralph Healy, Patrick McGuire and objectors Vernon Adamson, Patricia Mashburn, Theda Enfinger, Pamela Davis, James L. Gould and Louise Peel. In addition, witnesses J. Vernon Patrick, Jr., and Lee Bartlett presented sworn testimony in the form of affidavits and were present in open court and available for examination and cross-examination, which was waived by the objectors; and sworn testimony in the form of affidavits and exhibits was submitted by each of Frank M. Wilson, James Allen Main and Walter R. Byars. The parties and objectors also offered voluminous documents and sworn testimony, including depositions, exhibits and trial testimony in the case of *McAllister v. Liberty National*, CV-92-4085-RLB (a case tried in the Circuit Court of Mobile County involving the same alleged pattern and practice of company-wide fraud at issue here), and the Court received into evidence virtually the entire record in the *McAllister* case and the pertinent record in *Boswell v. Liberty National*, CV-92-3342-FDM, (another cancer exchange case which was the subject of a 12(b)(6) dismissal in favor of Liberty National in the Circuit Court of Mobile County). The Court also received into evidence a multitude of other voluminous exhibits,



depositions and documents filed by the parties, intervenors and objectors before and after the hearing, all of which was given due consideration by the Court. The Court is also familiar with the recent Alabama Supreme Court decision reversing and remanding *Boswell* for further proceedings.

Several of the objectors appeared and testified in person at the January 20 hearing, and no objector was denied an opportunity to be heard in person (or, if they chose, by affidavit) at the January 20 hearing. A vast majority of the objectors were represented by counsel present at the hearing. All of the written objections and related motions and filings, together with the oral testimony and evidence presented by the objectors, have been duly considered by the Court. Each of the objections (and all motions of objectors and intervenors not previously granted) are hereby overruled in accordance with this Court's approval of the settlement as modified. Those rulings expressly made on specific motions at the Fairness Hearing and at the subsequent hearing on May 19, 1994, are specifically incorporated herein by reference.

This Court has given due consideration to all of the evidence presented and all of the arguments made at the Fairness Hearing; all of the briefs and exhibits filed with the Court in support of, or in opposition to, the proposed settlement; the terms and conditions of the Stipulation and its attachments and amendments; the affidavits, exhibits and memoranda filed with the Court in support of and in opposition to the proposed settlement; the objections (and related motions) raised with respect to the proposed settlement; and all of the live testimony presented at the Fairness Hearing.

This Court has presided over all facets of this civil action since it was filed, and is familiar with the legal and factual issues presented by this class litigation. Deeming it appropriate to do so, this Court has given due consideration to the totality of the circumstances and the entirety of the record of this class action. The Court has also given particular consideration to the live testimony presented at the Fairness Hearing and the demeanor and credibility of the witnesses who were examined and cross-examined in open court.

Having given all parties and all members of the plaintiff class the best practicable notice of the Fairness Hearing and an opportunity to object, submit evidence, appear and be heard in person or by counsel, and the Court having been duly advised, the Court finds that it has before it more than sufficient information upon which to determine the fairness, reasonableness, adequacy, and constitutionality of the Settlement.

2. *The Named Plaintiff/Class Representative.* Named Plaintiff/Class Representative Charlie Frank Robertson ("class representative" or "Robertson"), prior to August 29, 1986, had purchased from Liberty National Life Insurance Company ("Liberty National") and was the named insured under one of the old cancer policies, which in his case provided family cancer coverage. After August 29, 1986, Robertson terminated this old policy and purchased one of the new policies to replace his old policy. Neither Robertson nor any member of his family has been diagnosed with cancer, and no claim for benefits has been made under Robertson's "new policy."

On October 2, 1992, Robertson amended his existing complaint against Liberty National to assert, on behalf of himself and a purported class, claims arising out of certain alleged cancer policy exchange programs conducted by Liberty National.

The class action complaint, as amended, sought equitable and legal relief, including injunctive and declaratory relief and ancillary monetary relief in the form of compensatory and punitive damages, and a reasonable attorneys' fee. The gist of the complaint was that the alleged cancer exchange programs were implemented pursuant to an intentional pattern and practice of misrepresentation and concealment conceived at the management level of Liberty National and perpetuated against the class as a whole pursuant to an alleged scheme of fraud.

Robertson had filed suit against Liberty National, on or about May 12, 1992, initially asserting claims arising from a life insurance policy issued by Liberty National. All claims arising out of or related to the life insurance policy were thereafter settled in a separate agreement between Robertson and Liberty National. With due consideration for the Court's own supervision of all proceedings from the inception of this case, and the live testimony presented in open court on these issues at the Fairness Hearing as well as the totality of the record, the Court finds that the settlement of this life insurance claim was a fair, arms-length settlement which has no bearing on this Settlement Agreement, and which is in no manner relevant to this class litigation, and in no way impugns the integrity of negotiations regarding the class action settlement.

3. *The Alleged Conduct.* In simplified terms, the class action claims asserted against Liberty National arise out of a series of cancer insurance policy exchange programs whereby Liberty National allegedly instituted formal or informal exchange programs and practices to offer its cancer policyholders certain "new" cancer policies as replacement for certain "old" cancer policies (as defined in the Stipulation). These "new" or "replacement" policies imposed monetary limits on benefits for radiation, chemotherapy, and prescription chemotherapy drugs, and eliminated coverage for other out-of-hospital prescription drugs prescribed for the treatment of cancer, which benefits were all provided without monetary limitation under the old policies. In some cases, policies were formally exchanged, and in others, exchanges occurred pursuant to lapses of old policies and subsequent purchase of new policies.

The Court finds that prior to August 29, 1986, Liberty National offered policies of insurance providing benefits to policyholders and insureds who were diagnosed with cancer. Certain of those cancer policies ("old policies") provided benefits payable without monetary limits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs. Beginning on or about August 29, 1986, and thereafter, Liberty National instituted a series of programs and practices to offer insureds who had "old" cancer policies and who had not suffered internal cancer a replacement of those old policies with one of several new cancer policies ("new policies"), which new policies contained monetary limits for radiation, chemotherapy and prescription chemotherapy drugs, and eliminated the benefit for other



out-of-hospital prescription drugs prescribed in connection with the treatment of cancer ("alleged cancer policy exchange programs"). While the "new" or "replacement" policies also provided certain new or enhanced benefits not provided in the "old policies", certain benefits were reduced or eliminated under the "new policies." As of August 29, 1986, Liberty National discontinued the sale of "old policies", but "old policies" issued prior to that date remained in force. Under both the "old" and "new" policies, all benefits for treatment rendered to any person covered under the policy are payable to the named insured under the policy (or his or her assignee). Beginning in 1990, additional "new policies" were introduced and offered both to holders of "old policies" and holders of the 1986 series "new policies."

Robertson, on behalf of himself and the Class, contended that in the course of implementing the alleged cancer policy exchange programs, Liberty National misrepresented or failed to disclose material facts, including but not limited to the desirability or necessity of replacing the "old policy" with a "new policy"; the relative benefits afforded by the old and new policies and the need or desirability for the insureds to exchange the old policies for new policies (or to exchange one new policy for another new policy); misrepresented the new policies as "better" policies; specifically failed to disclose the monetary limits imposed by the new policy upon benefits for radiation, chemotherapy and prescription chemotherapy drugs; specifically failed to disclose the elimination of coverage for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer; and failed to adequately inform policyholders

that such coverages were provided under their old policies without monetary limits or exclusions.

Class Counsel has portrayed Liberty National's conduct as gross, willful and oppressive. Class Counsel has further contended that the fraud resulting from this conduct was a conscious fraud resulting in a company-wide pattern and practice of inducing policyholders to switch from the old policies to the new policies (both through exchange and lapse/reissue) based upon numerous acts of fraud, misrepresentation, and nondisclosure.

Liberty National denies these claims and allegations, and contends that the new policies provide substantially greater overall coverage than the old policies, and that the new policies have paid substantially greater sums in overall benefits to a large majority of those who later were diagnosed with cancer. Liberty National has adduced significant evidence to this effect, including the evidence verified in the credible live testimony and affidavits of Anthony McWhorter and Thomas Hamby, as well as independent actuaries. Liberty National also contends that the limits of the new policies were clearly disclosed in the "new policies" themselves and the written sales brochures that were used to market them.

Without deciding the merits, for the purposes of determining the fairness of the Settlement, the Court has assumed that Liberty National engaged in a company-wide pattern and practice of fraudulent nondisclosure and misrepresentation, and was designed to induce exchanges of cancer policies by healthy insureds by any means possible. If the settlement is fair judged by that



standard, then it necessarily is fair given all of the actual risks and uncertainties of the litigation.

Based upon the record, and the assumption that the allegations of a company-wide fraudulent scheme are true, the Court finds that the claims of all class members derive from a common course of conduct pursuant to a unitary scheme; that Named Plaintiff was affected by such conduct and is an adequate representative of the Class with claims typical of the Class; and that Class Counsel are experienced and well-qualified to act as Class Counsel, and have in all respects properly discharged the duties attendant to that role.

4. *Findings Regarding The Class Certification, and the Negotiation and Preliminary Approval of the Settlement.* On March 10, 1993, this Court entered a class action certification pursuant to A.R.Civ.P. 23(b)(2). The certification hearing was originally convened on October 20, 1992, at which hearing the named plaintiff and putative class representative Robertson filed and presented affidavits of Robertson, Robert Stewart and John Miller and a brief in support of certification. The named plaintiff/class representative presented sufficient evidence to the Court upon which to obtain preliminary certification of the class. Liberty National's counsel opposed the certification and prevailed upon the Court to delay certification until Liberty National had an opportunity to conduct certain discovery. The certification hearing was thereupon rescheduled for March 8, 1993, at which time substantial arguments for and against certification were presented to the Court prior to its officially convening the certification hearing. Those arguments were only briefly reiterated during the transcribed hearing itself. The nature and

tenor of the arguments and position of counsel for both parties, as well as the Court's own decision-making process, negated any possibility of collusion with regard to the March 10 certification order.

The Court is aware that the parties, with the Court's encouragement, had conducted some preliminary settlement negotiations prior to and about the time of the March 10 certification order. The Court is of the opinion and finds, based on its own awareness of settlement negotiations, and based upon the record, that there was no settlement agreement between the parties at the time of the March 10, 1993, certification.

The Court is aware that there is an entry on the docket sheet for this action near the time of the March 10, 1993, certification which appears to indicate that the class action had been "settled." The Court is not aware how or why this entry came to be made on the docket sheet of this Court. However, on March 10, 1993, this Court had not been informed that the class action had been settled, and in fact knew that the class action had not been settled. The Court expressly finds based on the record and the Court's awareness of the nature and tenor of subsequent negotiations between the parties that this entry on the docket sheet of the Court was erroneous. The best judgment of this Court is that the confusion arose from the settlement of the named plaintiff's separate individual life insurance claim, on the one hand, and this Court's oral request to the parties to prepare an order reflecting this Court's decision (on or about March 10) to preliminarily certify the class as to the cancer exchange claims, on the other hand.

5. *Conduct of Class Counsel in Vigorously Pursing [sic] the Claims on Behalf of the Class.* Following the March 10, 1993, certification, the Court continued to encourage the parties to investigate the possibility of a settlement of the complex class action. The parties periodically reported to the Court on their progress toward a settlement agreement. The Court was aware then, and finds now, based upon the record, that the settlement negotiations reached several impasses and were broken off on several occasions. The Court finds from all of the evidence presented to the Court that the settlement negotiations were conducted at arms-length, without collusion, and were the result of hard and intense bargaining by able counsel on both sides.

Settlement was effected more than 8 months after the commencement of this class action. Before executing the settlement agreement, Class Counsel had access to the information furnished by certain clients and Class Members, including Robert Stewart, John Miller and Dan Head, the former President and Vice Presidents, respectively, of Liberty National, which in Class Counsel's opinion, clearly established a company-wide fraud. Stewart and Miller both were deposed and used to establish the fraud liability in the *McAllister* case, where the plaintiffs were represented by the same counsel appearing for many of the objectors here. Additionally, Class Counsel had extensive access to formal and informal discovery prior to entering into the proposed Settlement. Formal and informal discovery included the production of more than 7 bankers' boxes of documents by Liberty National. Subsequently, several more depositions (and the production of numerous documents) occurred pursuant to the

Court's Order of February 22, 1994. Even before then, by informal discovery, John S. Moyse, employed as an actuarial expert by Class Counsel, was given access, under a protective agreement and order, to all non-privileged Liberty National records relating to the subject cancer policies which he deemed pertinent, and spent over 250 hours collecting and reviewing actuarial information and studies, cancer insurance, policy forms (including a settlement policy form, previously proposed to but not accepted by Class Counsel), rate filings, premium and claim records, documents, reports and claim models of Liberty National, among other things; and interviewing Liberty National's chief actuary, Anthony L. McWhorter, at length concerning the "old" and "new" cancer policies and the cancer policy exchange programs employed by Liberty National subsequent to August 29, 1986, among other things.

The Court has reviewed the discovery filed with the Court and has heard the live testimony of expert Moyse, former President Stewart and former Vice President Miller, including testimony concerning the availability and review of information, the review of various settlement proposals, and review and approval of the final Settlement Agreement which is before this Court. Additionally, in his affidavit, Moyse informed the Court of his role in reviewing various drafts and the final Settlement Agreement, and in calculating the value of this Settlement.

Based upon all of the evidence before the Court, the Court finds that Class Counsel had (and presently have) before them sufficient information, documents and records, together with the benefit of the advice and expertise of actuarial expert Moyse and former Liberty



National officers adverse to Liberty National, to properly and fully evaluate the merits of the proposed litigation, and to determine whether the proposed Settlement was fair, reasonable and adequate. The Court further finds that Class Counsel – Jere L. Beasley, Frank M. Wilson, James A. Main and Walter R. Byars – are all experienced trial counsel in complex litigation, including class action litigation, who have properly weighed and balanced the factual and legal issues, and that with an experienced actuary they properly evaluated all settlement proposals and thereafter accepted and recommended to the Court the Settlement Agreement in the good faith exercise of competent and reasoned judgment.

The Court expressly finds that the proposed Settlement was reached after meaningful and sufficient discovery, after arms-length negotiations, by capable and experienced Class Counsel. The Court further finds that after substantial discovery, both informal and formal, with the intent and purpose to effect a fair and reasonable, full and final settlement based on extensive hard-fought, arms-length negotiations, Class Counsel ultimately concluded in good faith that a settlement of the class action litigation on the terms set forth in the Settlement Agreement would be in the best interests of the Class as a whole. The court expressly finds that the settlement was not the product of collusion. Compare *Cotton v. Hinton*, 559 F.2d at 1330; *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992).

In addition to their claims of collusion, certain objectors have directly placed at issue the competence and conduct of a class counsel and specifically whether class counsel has conducted themselves within the standard of

care of reasonably competent counsel. See *Alabama Code*, § 6-5-570 et sec. (1988). As previously noted, the Court finds that class counsel vigorously pursued these claims before recommending settlement to the Court and have, in all respects, properly and appropriately represented the class.

As counsel for the class as a whole, class counsel was prohibited from preferring the interest of a particular class member. In other words, class counsel could not be bound by the fact that many of these objectors (pursuing their individual interests only) would have preferred a settlement which included opt-out rights. Although, in a sense, every class member is a "client" of class counsel, it is the interest of the class as a whole and not the interest of individual class members that class counsel must pursue. Clearly, class counsel have vigorously bargained for the best possible settlement and have ultimately obtained a settlement which this Court finds to be fair and reasonable to all members of the class. This Court finds that class counsel has, at all times, considered the best interest of the class as a whole and that their conduct in that regard falls well above the minimum standard of care of reasonably competent attorneys provided by Alabama law.

The Court also notes that many of the issues presented by this case are within areas of unsettled law. Counsel for objectors, Champ Lyons, Jr., testified that no attorney could predict what the outcome of a case might be if tried. In addition, Mr. Lyons agreed that the law is very unsettled as to how many individual class members could pursue individual claims and obtain punitive damage awards. It is very unsettled whether the individual



class members, as a practical matter, have a claim for punitive damages in light of the decision already rendered in the *McAllister* case and the possibility of additional punitive damage awards by individual class members who were fortunate enough to reach the courthouse first.

The fact that this Court has suggested substantial additional relief through this settlement prior to approving it should, in no way, reflect on the competence of class counsel or the vigor with which they pursued these claims. By its nature, the Settlement Agreement was preliminary and all parties expected additional discovery and information might well lead to modifications. At any time in the process the Court could refuse to approve the Settlement. This Court finds that considering the substantial benefits provided to the class as a result of the written Settlement Agreement which was preliminarily approved, class counsel would have failed to adequately represent the interest of the class if that proposal had not been presented to this Court for consideration. Based on the Court's analysis of the law and the Court's own independent review, the Court has determined to require the February 4, 1994, changes in the Settlement Agreement.

6. *The Proposed Settlement and Settlement Agreement.* On June 16, 1993, the parties reached a settlement and executed the Settlement Agreement and presented the same to the Court with their recommendation that the same be preliminarily approved. Thereafter, on June 16, 1993, this Court issued its Order with respect to the Proposed Settlement preliminarily approving the terms of

the Settlement, and reaffirming the Rule 23(b)(2) certification of the class, the adequacy of the Class Representative Robertson and Class Counsel, among other things. The Court also issued a refined and clarified definition of the class relating back to the prior class certification on March 10, 1993.

The terms and conditions of the proposed Settlement are described fully in the Stipulation (a copy of which was mailed to the Class Members as a part of the Class Notice pursuant to this Court's June 16 Order), which Stipulation is incorporated herein by the Court. In simplified terms, the Settlement provided extensive injunctive and equitable relief for the common benefit of the Class and Class Members, including the following:

(a) An injunction prohibiting the institution or continuation of any cancer policy exchange programs and prohibiting any future program or practice for the exchange or substitution of cancer policies or coverage with diminished or eliminated benefits without full disclosure to the policyholder;

(b) Full restitution of 100% of any overall monetary loss resulting from the monetary limitations or elimination of coverage contained in the replacement policies;

(c) Reformation of all "new" replacement policies currently in force to eliminate monetary limitations on radiation, chemotherapy, and prescription chemotherapy drugs and the exclusion of other out-of-hospital prescription drugs used in the treatment of cancer, whether or not the Class Member suffered any monetary loss;

(d) An injunction against denying otherwise valid future claims under the new policies for benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs administered in connection with cancer on the basis of the challenged monetary limits upon or exclusions of said benefits;

(e) Reinstatement of certain lapsed policies prospectively without evidence of insurability and without payment of back premiums;

(f) An injunction against any increase in premiums prior to January 1, 1995; and

(g) An injunction requiring common pooling for all rate filing purposes.

Additionally, over and above full monetary restitution, the Settlement provided ancillary monetary relief to class members who had suffered cancer and whose benefits were affected by the challenged limitations, in the form of extracontractual or punitive damages placed in two escrowed funds totalling \$4 million (plus interest from June 16, 1993, until the date of distribution). In addition to the relief awarded Class Members, the Settlement required Liberty National to pay attorneys' fees to be determined by the Court (not to exceed \$4.5 million) and expenses (not to exceed \$35,000) plus other specified costs, including fees of experts and consultants (not to exceed \$150,000.00), and their expenses. The Settlement provided that these fees and expenses, including the fees and expenses of Class counsel, would be in addition to the benefits provided under the Settlement, and would not be deducted from Class benefits, so that the class benefits from the Settlement represent a net recovery

achieved for the benefit of the Class. Additional injunctive and equitable relief was also provided by the Settlement.

According to the testimony of Class Counsel's actuarial expert, John S. Moyse (live and by deposition and affidavits), the total pecuniary value of the Settlement (before the subsequent modifications set forth in this Court's Order of February 4, 1994) was \$39.4 million, plus the value of certain other valuable injunctive and equitable benefits which are not measurable pecuniarily but accrued to the common benefit of the class. The Court finds that the value of the June 16, 1993, settlement was not less than \$39 million, before the subsequent modifications set forth in the Court's February 4, 1994, Order Conditionally Approving Class Action Settlement.

The Court finds that Class Counsel's actuarial expert, John Moyse, who testified at the Fairness Hearing and presented his affidavits in support of his expert opinion as to the monetary value of the Settlement, was fully qualified and competent to testify as an actuarial expert, was credible in his demeanor, responsive to questions, and a credible and believable witness who ably asserted (and on cross-examination persuasively defended) his opinions and evaluations as well as his factual testimony. The Court finds that Moyse's conclusions as to the total monetary value of the original Settlement in the amount of \$39.4 million as set forth is a well-reasoned and accurate opinion and projection of these values, and that Moyse's projected total value is within the range calculated by Liberty National's chief actuary, Anthony McWhorter, who testified (personally and by affidavits)



as an actuarial expert that the monetary value of settlement, in addition to substantial non-monetary benefits in the form of injunctive and other equitable relief, falls within the range of \$33.9 million to \$49.9 million.

The Court further finds that Anthony McWhorter was qualified as an actuarial expert and competent to testify as to the matters presented to the Court by his live testimony and affidavits, was credible with regard to the matters of his expertise and factual knowledge, was credible in demeanor, and was responsive to the questions. The Court finds that Mr. McWhorter was a credible and believable witness, and that his opinion as to the range of the monetary value of the Settlement is accurate and reliable and reinforces the specific valuation provided by Mr. Moyse.

The Court finds that the testimony of Ralph Healey, tendered by objectors as an actuarial expert, was self-contradictory, unbelievable and at times nonsensical. Mr. Healey's testimony and demeanor were not convincing, and the Court finds that his testimony and analysis of the proposed Settlement is not credible and is due to be disregarded in toto.

Based upon its consideration of all of the evidence, the Court finds that the pecuniary value of the Settlement, and its cost to Liberty National, before the modifications set forth in the Court's February 4, 1994, Order, was not less than \$39 million, in addition to other substantial injunctive and equitable relief which provides additional valuable but non-measurable benefits to the Class. The Court adopts the factual averments of Mr.

Moyse concerning the value of the June 16, 1993, settlement as the findings of this Court. The specific benefits and values are fully set forth and explained in Mr. Moyse's October 28, 1993, affidavit which has been reaffirmed in his live testimony and supplemental affidavit, and those values are adopted by the Court and incorporated herein by reference.

The Court's June 16, 1993, Order With Respect To The Proposed Settlement preliminarily approved the Settlement set forth in the Stipulation and ordered notice to Class Members. By its terms, the Settlement Agreement is conditioned upon and subject to (among other things) the final approval of this Court, and final binding affirmance without modification in the event of appeal. In its order preliminarily approving the proposed Settlement, the Court further provided that if the Settlement (with any subsequent modifications agreed to by the named parties and Class Counsel) was not approved (and affirmed without modification in the event of appeal), it shall be terminated and shall become void (except as to certain obligations to pay notice and expert expenses). The June 16, 1993, Order approved the proposed Settlement, on a preliminary basis only, subject to further consideration at a Fairness Hearing to be held by the Court, after an opportunity for the parties and the objectors to submit objections, evidence, briefs, and other materials in support of or in opposition to the proposed settlement.

7. *The Notice.* The Class Members include the named insureds and other insured family members under approximately 400,000 cancer insurance policies issued by Liberty National primarily in Alabama and 4 other states. Prior to the January 20 hearing, pursuant to the



Order, a court-approved notice was delivered by first class mail, postage prepaid, to the last known address of each named insured class member "and family," and a court-approved summary notice of the hearing and Settlement was published in the following newspapers: *Clayton Record*, Clayton, Alabama; *Eufaula Tribune*, Eufaula, Alabama; *Union Springs Herald*, Union Springs, Alabama; *Mobile Press Register*, Mobile, Alabama; *Montgomery Advertiser/Journal*, Montgomery, Alabama; *Birmingham News*, Birmingham, Alabama; *Huntsville Times*, Huntsville, Alabama; *Dothan Eagle*, Dothan, Alabama; *Anniston Star*, Anniston, Alabama; and *USA Today*, and at least one major newspaper to each other state in which Liberty National cancer policies are approved for issuance. The court-approved notice advised Class Members, among other things, of the pendency of this class action, the background facts and the terms and conditions of the Settlement, and the hearing to be held before the Court with respect to whether the Court should approve the settlement and dismiss this action ("Fairness Hearing"). The Settlement Agreement itself was attached to the notice. The notice advised Class Members that they had a right to object to the settlement, to submit evidence and documents in opposition to the settlement, and to appear and be heard at the Fairness Hearing. A proof of distribution of the notice and proofs of publication in affidavit form were filed with, accepted and considered by the Court.

All interests of class members have been presented to and considered by the Court in one fashion or another. Based upon the evidence before it, including the sworn proof of distribution, the Court finds that the court-

approved personal notice delivered to Class Members regarding the class action and the proposed settlement (which notice was in addition to publication of a court-approved notice in more than the 30 enumerated newspapers) was the best practicable notice under the circumstances, was fully consistent with Rule 23(c)(2) of the Alabama Rules of Civil Procedure, and constituted due and sufficient notice of the Settlement and all other matters addressed in the notice and its exhibits, including the pendency of this action, the maintenance of this action as a class action, the terms of the settlement, the binding effect of the settlement on all Class Members, the release and dismissal of all claims, the mandatory no-opt-out provisions of the Class certification and settlement, the proof of claim procedure, the right to object to the settlement and to submit documents and evidence regarding the settlement, and to appear at the Fairness Hearing and to be heard in person or by counsel. The Court finds that this notice clearly provided absent class members a fair and adequate opportunity to object to the Settlement, and notice that the Settlement (if approved with or without modification) would finally adjudicate and foreclose all claims related to transactions or programs involving the exchange of "old policies" and their replacement with "new policies." See *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981)

Although objectors' expert Patrick McGuire testified that he might have employed a more simplified and shorter notice, with shorter sentences, the form of the notice provided to Class Members was reviewed, understood and approved by the Court in advance. In effect, the primary criticism of Mr. McGuire was that the notice

provided too much information, and used too many words to assure technical correctness. However, the Court finds that the notice itself (exclusive of its attachments) was relatively simply, and the headings in the attached Stipulation taken alone – “cash payments to be made in escrow; Class Members insured under old policies which lapsed after August 29, 1986, may reinstate policies; Class Members insured under new policy to receive waiver of limits on benefits; premiums not increased from current rates; Liberty National to provide full restitution of certain benefits to Class members who have submitted certain benefit claims under the new policies; incidental monetary settlement fund for Class Members who submitted certain cancer claims under new policies; supplemental extra-contractual monetary relief fund for certain Class Members,” etc. – were clearly understandable and sufficient to convey the principal features of the benefits to the Class Members. Even those who could not read at all clearly had reason to avail themselves of the assistance of counsel or other knowledgeable persons to advise and assist them in protecting their rights. The notice clearly conveyed its nature as a court-ordered notification regarding important matters. The Court finds that the notice was the best practicable notice under the circumstances and constituted due and sufficient notice to afford due process.

To satisfy the requirements of Due Process and the notice standards of Rule 23(e), class notice “need only properly identify the plaintiff and generally describe the terms of the settlement so as to alert members ‘with adverse view points to investigate and to come forward and be heard.’ ” *Battle v. Liberty National Life Ins. Co.*, 770

F.Supp. 1499, 1522 (N.D. Ala. 1991), quoting *Mendoza v. United States*, 623 F.2d 1338, 1352 (9th Cir. 1980), cert. denied, 452 U.S. 912 (1991). The Court finds that the notice given in this case clearly meets and exceeds these requirements.

The notice given to all Class Members also attached a Proof of Claim form which contained step-by-step instructions to each Class Member for completion and submission of claims to share in the restitution and monetary settlement pools. The Court finds that the Proof of Claim Form and the attendant procedures were fair, reasonable, adequate, and consistent with procedures used in other class actions.

The Court finds that the notice given to Class Members, which attached a copy of the Stipulation, provided more than sufficient information to the Class Members and constituted due and sufficient notice and afforded due process to the Class Members.

8. *The Fairness Hearing.* The Fairness Hearing originally scheduled for November 4, 1993, was postponed to December 20, 1993, and was again postponed to January 20, 1994, when it finally convened (after a pre-hearing conference with counsel for the named parties and the objectors on January 19, 1994). The Fairness Hearing took three days to complete, and was held on January 20, 21 and 24, 1994. No objector was refused the opportunity to testify.

By the time of the fairness hearing, all Class Members had a full and fair opportunity to submit objections, affidavits, and other written materials in support of or in opposition to the proposed settlement. The objectors were



given the opportunity to depose, and on October 28, 1993, did depose Class Counsel's actuarial expert, John Moyse, and were furnished copies of all written documents received by Class Counsel from Liberty National which Class Counsel had relied upon in connection with the proposed settlement.

By December 15, 1993, Liberty National had filed and served virtually all of its evidence and written materials and affidavits in support of the proposed settlement, thereby giving objectors more than a month in which to analyze that evidence prior to the Fairness Hearing. In addition, the objectors had substantially earlier possession of or access to a huge volume of discovery generated in *McAllister*, in which the claims of 19 individual plaintiffs claiming the same pattern and practice of alleged fraud had been consolidated for purposes of discovery. Finally, pursuant to the Court's Order of February 22, 1994, the objectors were given access to and an opportunity to participate with Class Counsel in substantial additional discovery. By virtue of the submissions of both Liberty National and the objectors, the Court has before it virtually the entire *McAllister* record, including the trial transcript, the trial exhibits, all or virtually all of the more than 40 depositions taken and the reams of documents produced.

This Court has given due consideration to the totality of the record in this case, including the written submissions of the parties and the objectors; the *McAllister* record; all depositions and documentary and other written evidence; all affidavits filed with the Court; all live testimony presented at the Fairness Hearing; and the demeanor and credibility of the witnesses who gave live

testimony. For purposes of this Fairness Hearing, the Court has given due consideration to all exhibits, written materials and testimony submitted to the Court, and has thereby essentially overruled all objections to the Court's consideration of exhibits, written evidence or testimony, except for those exhibits, written materials and portions of testimony which were expressly excluded by the Court's rulings at the Fairness Hearing. The Court finds that the Fairness Hearing and the pre-Fairness Hearing procedures together with the post-Fairness Hearing discovery and subsequent hearings and proceedings constituted a full and fair opportunity for objectors to appear, be heard, and submit evidence and briefs in support of their positions. The Court further finds that the objectors took full advantage of these opportunities.

9. *The Fairness of the Proposed Settlement And Adequacy of Representation.* After independent review of the proposed settlement, the terms and conditions of the Stipulation, the evidence presented, and the entire record of this civil action, this Court has concluded and hereby finds that the proposed settlement of this class action, pursuant to the terms and conditions of the Stipulation, is fair and reasonable, and as modified in the Court's Order of February 4, 1994 (which modifications were thereafter accepted by the named parties and their counsel), is unquestionably adequate. The Court finds that the Settlement as modified by the Court in its February 4, 1994, Order is in the best interests of the class as a whole and the class members, and should be approved. For purposes of this finding, the Court has assumed as true the allegations of the named plaintiff and objectors concerning Liberty National's conduct.



At the time of its preliminary order on June 16, 1993, this Court after careful consideration was of the opinion that the proposed Settlement, pursuant to the terms and conditions of the Stipulation, was fair, reasonable and adequate, in the best interests of the members of the Plaintiff class, and should be preliminarily approved, subject to further review by the Court based on further development of the issues, including objections, testimony and evidence to be taken in connection with a fairness or settlement hearing. As stated in the notice, this Court reserved the right, following the hearing, to approve the settlement with or without modification and with or without further notice. This Court is authorized to make a determination as to whether or not to approve the proposed settlement, or it may make suggestions to the parties for modifications of the settlement proposed. See *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977).

The Court finds that Class Counsel have ably supported the proposed settlement, its fairness, reasonableness and adequacy and have insisted that the settlement as proposed in the Stipulation is in the best interests of the class and should be finally approved by this Court. Based upon the entire record, the Court finds that Named Plaintiff and Class Counsel have each adequately and fairly represented the class, and have protected the best interests of the class as a whole and the class members. The Court further finds that Class Counsel, with the intent and purpose to effect a fair, reasonable and adequate settlement, and based on extensive arms-length negotiations, ultimately concluded that a settlement of the litigation on the terms set forth in the June 16, 1993, Settlement Agreement would be in the best interests of

the class, and that not to accept the Settlement (subject, of course, to the ultimate satisfaction and approval of this Court) would serve only to generate a potential punitive windfall for the first few class members who might get to trial and obtain a successful verdict, to the detriment of remaining class members who would potentially be deprived of not only of any recovery, but perhaps deprived of all coverage under any Liberty National insurance policy due to receivership or rehabilitation. The Court further finds that the decision by Class Counsel to agree to and support the proposed settlement was well reasoned, valid and in the best interests of the Class Members.

As stated, this Court was of the opinion, at the time it preliminarily approved the proposed settlement on the terms set forth in the Stipulation, that the proposed settlement was fair, reasonable, adequate and in the best interests of the class and class members. Based upon the entire record, the Court remains of the opinion and finds that the settlement as originally proposed was fair, reasonable and adequate as a redress of the claims of the class members. However, based on the record before the Court following the Fairness Hearing, and upon the Court's review of the evidence and arguments concerning the several pending pre-certification cases which were excluded from (but given the option to join) the certified class, the Court finds that the best interests of the class members can be protected only by the inclusion in the settlement of sufficient punitive equitable and monetary relief against Liberty National to effectively remove and exceed all profits or gain made by Liberty National from

the exchange of class members' policies. The Court further finds that the extensive injunctive relief afforded by the Settlement effectively places Liberty National under the continuing oversight of this Court and the spectre of being held in contempt of this Court if Liberty National violates this Court's injunctions, and has a deterrent and punitive effect.

This Court finds that with the modifications to the settlement as set forth in the Court's Order of February 4, 1994, which the Court understands will be accepted by Liberty National, the Named Plaintiff/Class Representative and Class Counsel if there are no other modifications, this settlement will provide substantial, fair, reasonable and adequate relief for the claims of the class, including both the predominant injunctive and equitable relief and substantial monetary relief. The Court further finds that the injunctive and equitable provisions, coupled with the supplementary monetary provisions, both as modified by the Court and accepted by the parties, will constitute sufficient punishment and deterrence to Liberty National from engaging, now and in the future, in conduct of the type made the subject of this class action, particularly in light of the broad and sweeping injunctive relief which effectively places Liberty National under the continuing oversight of this Court, and subjects Liberty National to future contempt citations should Liberty National violate or attempt to violate this Court's broad injunction.

The Court therefore finds that the proposed settlement is due to be approved on the terms and conditions set forth in the Stipulation, with the modifications set

forth in the Court's Order of February 4, 1994. The findings and conclusions set forth in the Court's order of February 4, 1994, are hereby reaffirmed and incorporated herein by reference, and the amendments heretofore agreed to by the named parties in their letters to the Court of December 10, 14, and 15, 1993, are hereby adopted by the Court and approved.

The Court finds that the modifications increasing restitution from 100% to 150% will provide that those class members who suffered cancer but had claims denied due to the challenged monetary limits and exclusions of benefits contained in the new policies, will receive an enhancement on top of full restitution to 150% restitution, to compensate for any loss of the use of the money during the interim and any ancillary mental anguish, pain and suffering.

The Court finds that the enlargement of the period for the premium freeze is required to give class members the benefit of such freeze not only while this action was or is pending here (and perhaps on appeal), but additionally until the settlement is finally approved and affirmed and goes into effect, plus one year. The Court nevertheless finds that as a result of the Settlement more than eleven months of the premium freeze provided in the original Stipulation has already accrued to class members, which is itself a substantial benefit to the Class.

The Court also finds that the modification relating to future rate filings removes any opportunity for Liberty National to recover the costs of this settlement through future rate increases, and precludes Liberty National from doing so.



Additionally, at the Fairness Hearing it came to the Court's attention that Liberty National was not opposed to offering class members, who were insured under the old policies and who provide evidence of their insurability, the option of either keeping the old policy or exchanging that old policy for a new policy, as reformed pursuant to the proposed settlement, at current premiums based upon the class member's age at the time of such exchange, so long as it occurred pursuant to a court-supervised procedure. Consistent with statements made by Liberty National at the Fairness Hearing, the Court's Order of February 4, 1994, provides such an option. Although no legally cognizable claim of entitlement to such relief was presented by any objector, the Court finds that such relief is consistent with the overall intent and purpose of the settlement and is fair, reasonable and adequate.

The Court has heretofore found that the modifications to the proposed settlement set forth in the Court's February 4, 1994, Order would result in the addition of at least \$16,000,000 in additional value to the proposed settlement, and the Court hereby reaffirms that finding and all other findings in said Order. The Court further finds that the value of the proposed settlement to Class Members, and the cost of the proposed settlement to Liberty National, was at least \$39,000,000 prior to these modifications. With these modifications, the Court finds that the value of the proposed settlement would be not less than \$55,000,000.

The Court expressly finds that the cost of this settlement, with such modifications, will exceed any and all

gain to Liberty National from the cancer exchange programs and, when coupled with the substantial and far-reaching permanent injunctive and equitable provisions, constitutes the maximum punishment permissible under the Due Process Clause of the United States Constitution and completely sufficient deterrence of future similar practices. The Court finds that the overall settlement will be sufficient to punish Liberty National for the entirety of the effects of the alleged cancer exchange programs and the conduct involved therein. This is of particular significance to the class members, since this portion of the Court's order protects the class members from the greed of those who would attempt a personal award of all constitutionally permissible punitive damages in a single individual case, to the detriment of the class members who are insured under approximately 400,000 cancer policies issued by Liberty National.

The effect of this settlement, with the Court's proposed modifications, is, among other things, by injunction to halt the existing (and prohibit without full disclosure any future) cancer exchange programs, to reform the exchanged new policies to provide unlimited benefits for radiation, chemotherapy, prescription chemotherapy drugs and other out-of-hospital prescription drugs, to provide punitive damages and full restitution to class members who suffered cancer and received fewer total dollars under a new policy than they would have received under an old policy for the same cancer treatment, plus an additive of 50% to cover the cost of the loss of use of money and any attendant mental anguish, pain and suffering, and to effectively disgorge from Liberty National an amount in excess of its gains (whether or not

ill-gotten) from the sale or exchange of cancer insurance policies involved in this class action.

While this Court cannot conclude that the settlement, as proposed in the original Stipulation, was unfair, unreasonable or inadequate, the Court is of the opinion and finds that with the Court's proposed modifications (accepted by parties), the Settlement is undoubtedly fair, reasonable and adequate, is in the best interests of the class and class members, and is protective of the interests of the class as a whole.

10. *Additional Findings Regarding Fairness of Settlement.* As noted above, the Settlement has been found by the Court to be fair and reasonable even assuming the allegations of the complaint (and the allegations of the various objectors) concerning the alleged conduct to be true. The following additional findings clearly indicate that the Settlement is also fair, reasonable and adequate when judged against the factors utilized by other courts to determine the fairness of a proposed settlement.

Based on the entire record before this Court, as more fully set forth herein, the Court has given due consideration to the following factors utilized by other Courts, including but not limited to:

- (1) the likelihood of success at trial (including the likelihood of establishing damages and the likelihood of establishing liability on the part of Liberty National);
- (2) the range of possible recovery in the event of a trial;

- (3) the point on or below the range of possible recovery at which a settlement is fair, reasonable and adequate;

- (4) the complexity, expense and duration of the litigation;

- (5) the substance and amount of opposition to the settlement;

- (6) the stage of the proceedings at which the settlement was achieved; and

- (7) the financial ability of Liberty National to withstand a greater judgment in this case and potential for a judgment or series of judgments in amounts likely to trigger the Due Process curtain (as recognized in *Green Oil* and other similar cases) relating to the imposition of punitive damages.

See *Bennett v. Behring Corporation*, 737 F.2d 982, 986 (11th Cir. 1984) (adopting a 6-factor analysis); and *The City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2nd Cir. 1974) (9 relevant factors); and *Bryan v. Pittsburgh Plate Glass Co.*, 495 F.2d 799 (3rd Cir. 1974); cert denied, 419 U.S. 900 (1974).

The Court has independently evaluated, to the extent possible at this juncture of the litigation, the strengths and weaknesses of class members' claims, the strengths and weaknesses of Liberty National's defenses, the range of reasonableness of the settlement benefits in light of the best possible recovery, and the other factors identified in the foregoing authorities. The Court has weighed all the attendant risks of litigations (including the litigation and settlement value of the claims of each class member and the aggregate litigation and settlement value of the class



action). The Court has also considered the opinions of the expert witnesses and of Class Counsel, the Class Representative and counsel for the objectors. As detailed more fully in the following additional findings, this Court hereby finds that the proposed settlement is fair and reasonable and, as modified, is wholly adequate in terms of both its equitable and legal compensation and its deterrent effect, and is in the best interests of the class and Class Members and protects the class as a whole.

A. *Findings Regarding the Risk of Establishing Liability and Damages and Likelihood of Success at Trial.* In determining the fairness of the settlement, the Court must consider the likelihood of success by either party if the case were to proceed to trial. It is not a function of this Court to make ultimate findings on the merits of this case in deciding whether to approve the class action settlement. Although courts must closely analyze the facts and the law relevant to the settlement, this Court need not try the case to determine the fairness of the settlement. Judicial evaluation of a proposed settlement of a class action involves a limited inquiry, not into the merits, but into whether the possible rewards of litigation with its risks and costs are outweighed by the benefits of a certain settlement. See, *City of Detroit v. Grinnell Corp.*, 495 F.2d at 462 ("The court is only called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable"), citing *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971).

While the claims asserted in this action have potential merit, the Court finds that the complexities and

uncertainties characteristic of this type of litigation, and the sharply contested issues of fact, liability and damages exist which with respect to the contentions made on behalf of the class, create substantial risk for the class, and that the proposed settlement resolved these uncertainties for all parties to the litigation.

For instance, without deciding the merits, the Court acknowledges that Liberty National has argued that the claims of all or most class members suffer significant legal infirmities and are subject to substantial defenses (in addition to questionable factual basis for liability), including but not limited to: whether claims are barred by the statute of limitations or laches; whether the right to recover survives the death of the insured; whether there is any right to recover alleged differentials in premium rates which are shown on the face of the new policies and which rates were previously filed with the insurance departments in various states; whether the clear written disclosures on the face of the policies and sales brochures preclude any claim of fraud or non-disclosure either as a matter of fact or as a matter of law; and whether class members (such as Class Representative), who have not been diagnosed with cancer and made no claim for benefits under the new policy, have any right to recover or can prove damages given the undisputed fact that the new policies do contain higher benefits in some categories.

On this latter issue, in two cases involving the same pattern and practice of company-wide fraud as in this class action, the Mobile Circuit Court reached opposite conclusions. In *Boswell v. Liberty National*, CV-92-3343-FDM, the Mobile Court granted summary judgment on

the basis of *Moore v. Liberty National Life Ins. Co.*, 581 So.2d 833 (Ala. 1991), and *Allen v. Gulf Life Ins. Co.*, 617 So.2d 664 (Ala. 1993). However, the same court, but a different judge, in *McAllister v. Liberty National*, CV-92-4085-RIB, permitted a case filed by an insured who had not suffered cancer and had filed no claim to go to the jury, and the jury awarded the plaintiff \$1,000 in compensatory damages and \$1,000,000 in punitive damages. While the Alabama Supreme Court has now reversed and remanded *Boswell*, it did so in the context of a Rule 12(b)(6) dismissal, such that the allegations of the Complaint in that action were assumed to be true.

The *McAllister* record includes the closing argument asking the jury to punish Liberty National for the effect of the alleged cancer exchange programs upon Edith McAllister and "thousands of other Ms. McAllisters" affected by the cancer exchange programs. This argument and resulting punitive damages bring into effect another substantial legal issue as to whether Liberty National can be punished further by punitive damages and, if so, the extent of that additional punishment. Likewise of concern would be whether any successful claims of a few insureds would exhaust the punitive damages permissible under the Due Process guaranties [sic] of the United States Constitution, *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989), and similar authorities in other jurisdictions.

Based on the evidence and legal authorities submitted by Liberty National, there is a substantial risk that a large number of the claims of individual class members would be barred by the statute of limitations. For example, approximately half of the class members with cancer incurred their first cancer claim under the new policy

more than two (2) years prior to the filing of this lawsuit. Moreover, the new policies contain a clear written facial disclosure that the benefits for radiation, chemotherapy and prescription chemotherapy drugs had monetary limitations, and that other out-of-hospital drugs were not included within the covered benefits. The submitted evidence suggests that there are substantial risks to recovery based on the statute of limitations defense. See e.g., *Fabre v. State Farm Mut. Auto. Ins. Co.*, 624 So.2d 167 (Ala. 1993) (receipt of written documents clearly disclosing facts form which an alleged fraud could have been discovered begins the running of the statute of limitations on a tort action); See also *Ramp Operations Inc. v. Alliance Ins. Co.*, 805 F.2d 1552, 1554-58 (11th Cir. 1986); *Kelly v. Connecticut Mutual Life Ins. Co.*, \_\_\_ So.2d \_\_\_, 1993 W.L. 337201 (Ala. Sept. 3, 1993); ("fraud is discoverable as a matter of law for purposes of the statute of limitations when one receives documents that put one on such notice that the fraud reasonably should be discovered."); *McGowan v. Chrysler Corp.* \_\_\_ So.2d \_\_\_, 1993 W.L. 477336 (Ala. Nov. 22, 1993); *Kanter v. Church's Fried Chicken Inc.*, 582 So.2d 449, 453 (Ala. 1991); *Gray v. Liberty National Life Ins. Co.* 623 So.2d 1156 (Ala. 1993). Similar statute of limitations risks would exist under the laws of other states to the extent that any class member claims that the law of another state might apply, based upon the authorities cited in briefs to the Court.

Other risks result from the questionable factual basis for liability. For example, Liberty National presented substantial evidence that, among other things, the "new policies" in fact pay greater overall benefits to the majority of cancer victims; that the "new policy" overall was a better



policy than the "old policy"; that claims of damages were largely speculative or not legally cognizable on the facts developed on this record; that the "new policy" and the accompanying sales brochure clearly disclosed the challenged monetary limits on their face; that any representation was at the time made true or believed by Liberty National to be true; whether any such representation was a statement of fact or a statement of opinion, or "mere puffery"; whether there was any duty of disclosure beyond the disclosures contained in the written policies themselves and the sales brochures distributed with them; and other substantial factual and legal issues which tend to create a risk of establishing liability against Liberty National.

The Court finds and holds, without making any ultimate findings or conclusions regarding the merits of these defenses and obstacles, that there is substantial uncertainty as to the likelihood of success at trial by either party. The Court finds that all of these uncertainties are best resolved by a fair, reasonable and adequate settlement and that such a settlement is in the best interests of the class members.

B. *Findings Regarding the Risk of Maintaining the Class Action Through the Trial.* The Court finds that there are great risks in maintaining the class action through the trial of this case, including the risk of inconsistent adjudications by this and other courts; the complexity of attempting to manage the class action but for the settlement; the risk that, if the position of objectors were successful, Liberty National could be placed in rehabilitation or receivership by virtue of successful claims of non-class members before final judgment was reached; and

the likely duration and complexity of the pretrial proceedings and the trial itself.

C. *Findings Regarding the Range of Reasonableness of the Settlement in Light of the Best Possible Recovery.* The Court finds that the range of possible recovery value in this action is between zero (if Liberty National's position is sustained) and something in excess of \$100,000,000 at best. However, the Court also notes that there is a maximum point at which courts would order a remittur [sic] or at which Liberty National would be placed in receivership or rehabilitation.

The Court finds that the bulk of any award in the higher end of the range would almost certainly be punitive in nature, and the Court further finds that any recovery in excess of \$55,000,000 would certainly run the risk of being remitted by the trial court or the Alabama Supreme Court to that amount or lower, pursuant to the Due Process Clause of the United States Constitution, *Green Oil Co. v. Hornsby*, and similar authorities in other jurisdictions. In addition, any amount in the higher end of the range would almost certainly cause Liberty National to be placed in receivership or rehabilitation proceedings under the applicable insurance laws.

Moreover, there is authority to the effect that potential recovery of damages which are punitive in nature should not be considered in judging the reasonableness of the amount of a class action settlement. See, e.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974). The nature of punitive damages supports this view, in that no

plaintiff has a right to punitive damages; punitive damages under the law of Alabama and various other jurisdictions where available are solely within the discretion of the jury; and punitive damages are designed not to compensate the victim, but to serve societal goals of punishment and deterrence.

The Court finds that the substantial equitable relief granted, and especially the injunctive relief halting the alleged fraudulent practices now and in the future, reforming the insurance policies to remove the limits upon the challenged benefits, and the payment of full restitution, weighs heavily in favor of approving the proposed settlement, and certainly in favor of approving that settlement as modified by the Court. The Court finds that even if it is assumed that the proposed settlement, as modified, might represent less than the total recovery which could be awarded by a jury, there is no assurance that a larger recovery would be upheld by the appellate courts. The proposed settlement as modified represents a significant overall combination of legal and equitable benefits which the plaintiff class otherwise could never enjoy in the event Liberty National were to prevail, or if Liberty National were to go into receivership, rehabilitation or bankruptcy. See, *Alliance To End Repression v. City of Chicago*, 561 F.Supp. 537, 548 (N.D. Ill. 1982) (settlements, by definition, are compromises which "need not satisfy every concern of [the] plaintiff class, but may fall anywhere within a broad range of upper and lower limits."); *Flinn v. FMC Corporation*, 528 F.2d 1169, 1172-73 (4th Cir. 1975); (nor does the fact that the settlement "may only amount to a fraction of the potential recovery . . . *per se* render the settlement inadequate or unfair.")

The Court finds that by any measure the more than \$39,000,000 in pecuniary value of the legal and equitable recovery under the proposed settlement, or more than \$55,000,000 under the settlement as modified by this Court, represents a substantial benefit and award to the class members and falls well within the range of reasonable and probable recovery in the event of litigation.

Based upon the totality of the record, the Court finds that the settlement has a total cost and value of not less than \$55,000,000, which is well within the reasonable range of recovery for this action, even if one were to disregard the substantial risks of this litigation. The Court further finds that a succession of individual suits (if successful) could, and in all probability would, result in a determination "that as a practical matter would be dispositive of the interests of other [class] members . . . or substantially impede their ability to protect their interests" (Ala. R. Civ. P. 23(b)(1)(B)), particularly in light of the fact that each individual suit would no doubt attempt to punish Liberty National for the entirety of the "pattern and practice" involved in the alleged cancer exchange programs, thereby potentially eliminating punitive damage claims (and perhaps the viability of all other claims) for all but a few class members if the cases were tried separately. The Court incorporates herein and makes final the additional findings on these issues set forth in its Order of February 4, 1994.

The Court expressly finds that the proposed settlement, as modified at the insistence of the Court, provides the maximum permissible amount of punishment contemplated by the Due Process Clause of the United States Constitution, *Green Oil v. Hornsby*, and similar authorities



in other jurisdictions. Moreover, in light of all the attendant risks of this litigation, the Court finds that the substantial equitable and monetary relief afforded by this settlement is fair, reasonable, and adequate. The Court therefore overrules all objections to the proposed settlement, and finds that this settlement is fair, reasonable and adequate, and that approval of this settlement (as modified) is in the best interests of the class as a whole.

D. *Findings Regarding The Complexity, Expense And Likely Duration Of The Litigation.* The Court finds that this litigation involves asserted liability to a class of some 400,000 named insured policyholders (plus their additional insured family members). The Court finds that this litigation is extremely complex, and that both the expense and likely duration of the litigation (but for the settlement) would be great.

The alternative to settling class members' claims is to expend countless hours and dollars litigating this case, and to drain the assets of all parties and the resources of the Court system for years. This class action constitutes complex litigation, and the voluminous pleadings, evidentiary filings and briefs which have already been filed in this Court (and in the Supreme Court) demonstrate that, absent settlement, even the legal issues alone would be difficult and expensive to resolve. The Court file itself is demonstrative of the substantial resources that have already been committed by Class Counsel, by Liberty National and its attorneys, and by this Court. In addition to the resources of the parties, the continuation of this complex case would likewise deplete the judicial resources of this Circuit. There can be no question that further pursuit of this class action would constitute a

severe drain on the resources of both the parties and the Court system. See e.g., *In re U.S. Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992); ("Public policy strongly favors the pretrial settlement of class action lawsuits. See *Cotton v. Hinton*, 550 F.2d 1326, 1331 (5th Cir. 1977). Complex litigation - like the instant case - can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly illusive.")

E. *Findings Regarding The Reaction of The Class and The Substance and Amount of Opposition to The Settlement.* In determining whether the settlement is fair, reasonable and adequate, the Court considered the substance and amount of opposition to the settlement. The reaction of the vast majority of the class to the settlement is clearly not antagonistic. The court-approved printed notice was mailed to the insureds under more than 400,000 current and past cancer policies, and summary notices regarding the settlement were placed in more than 30 newspapers. At most less than 1/2 of 1% of the Class Members (including insured family members) filed timely objections, even given the Court's decision to accept late objections filed on or before January 20, 1994. In many cases, multiple members of the same family filed objections to the settlement even though they were all insured under a single family policy.

Thus, the amount of opposition is not substantial when compared to the size of the class. However, a settlement can be fair even where (unlike here) there is a large number of objectors. *Bennett v. Behring Corporation*, 737 F.2d 982, 988 (11th Cir. 1984); *Pettway v. American Cast*

*Iron Pipe Co.*, 576 F.2d 1157, 1217 (5th Cir. 1978); *Cotton*, *supra*.

No class member has provided a sound, objective reason for denying approval of the settlement, nor suggested any other reasonable form of settlement which would adequately address the interests of all class members. The Court finds that the objectors have made their position quite clear: they want to be excluded from the class action so that they can pursue their own individual interests in seeking to recover for themselves the maximum punitive damage award for the entire pattern of alleged conduct, even though at best such a scenario might result in a substantial recovery to some but not to all. This Court is of the opinion and finds that to permit opt-outs is not in the best interest of the Class.

In general, other grounds of objection either resulted from a misconstruction of the proposed settlement agreement or have been cured by virtue of the clarifications set forth in the Court's February 4, 1994, modifications of the proposed settlement. Moreover, the differing allocations to certain class members under the Settlement are rationally based on legitimate considerations, such as whether the class member had previously suffered cancer and incurred cancer claims. Moreover, there is no rule that a settlement must benefit all class members equally. See *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1984); *Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 506 n. 5 (5th Cir. 1981). Even if the complaining class members show that there is some degree of difference in the settlement agreement that showing may be rebutted by a factual showing that the differences are rationally

based on legitimate considerations. *Holmes*, 706 F.2d at 1148.

Several of the class members objected to having to continue doing business with Liberty National in order to receive any benefits of this settlement. The Court finds that while some benefits are available only if certain class members or objectors continue to do business with Liberty National, the benefits to all class members are substantial and the fairness to all segments of the class member population override the inconvenience of those few objectors who do not wish to continue to do business with Liberty National. Moreover, the Court finds that any class member receiving the reformed policy under the terms of this settlement is receiving benefits which include all the increased benefits of the "new policy" *plus* unlimited coverage for radiation, chemotherapy, chemotherapy prescription drugs and out-of-hospital prescription drugs, which coverage is not generally available for purchase in the marketplace. The availability of this "best of both worlds" coverage is an overall benefit which is in the best interests of the class as a whole and must prevail over the individual concerns of a few objectors. The option to receive the benefits afforded by this settlement is itself a benefit, whether the option is exercised or not.

In addition to having considered the objectors' objections to the proposed settlement, and the arguments by some objectors that they should be permitted to opt out of this class action, this Court has independently evaluated the terms of the proposed settlement of this class action, and has independently compared the benefits which members of the class will receive under the terms of the Stipulation with the likely rewards of litigation in



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order to determine whether the settlement of this action pursuant to the Stipulation is fair, reasonable and adequate and is in the best interests of the members of the Plaintiff Class, notwithstanding the fact that only a fraction of 1% of the class members have objected to the proposed settlement.

F. *Findings Regarding The Stage of the Proceedings and the Amount of Discovery Completed.* Settlement was effected more than eight months after the commencement of this class action. The Court finds that counsel for the plaintiff class and the actuarial expert employed by Class Counsel had extensive access to information, documents and other discovery (both formal and informal), prior to entering into the proposed settlement.

The Court has reviewed the discovery filed with the Court and has heard the live testimony of expert Moyse, former President Stewart and former Vice President Miller, concerning the availability and review of information and the review of preliminary drafts of proposed settlement agreements. Additionally, Moyse informed the Court of his role in reviewing various drafts and the final Settlement Agreement and in calculating the value of the benefits in earlier drafts and the final draft of this Settlement for the benefit of Class Counsel.

The Court finds that Class Counsel conducted a substantial factual investigation, and had before them sufficient evidence upon which to base their agreement to the proposed settlement. The Court further finds that, based upon a review and evaluation of that information, including the documents and filings with the Insurance Department, the information furnished by former officers of

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Liberty National, access to Liberty National's records and interviews with Liberty National's chief actuary, Class Counsel had more than adequate information to properly evaluate, with the assistance of the actuarial expert and former Liberty National executives, the proposed settlement, and that Class Counsel were adequately informed, and had before them sufficient information and evidence upon which to base their evaluation of and agreement to the proposed settlement, and based thereon, reached a proposed settlement which Class Counsel felt to be fair, reasonable, adequate and in the best interests of the class. Certainly the record now before the Court is sufficient to form a basis for Class Counsel's current recommendation that the settlement be approved.

In the process of encouraging and checking on settlement progress, the Court has personal knowledge, the testimony before this Court demonstrates, and, based upon the entire record, the Court finds that the settlement discussions and negotiations were conducted between class counsel and counsel for Liberty National at arms length over a several-month period of time during which counsel remained adversarial, and that such negotiations were free from fraud or collusion.

The Court further finds that Liberty National's stipulation to the maintenance of this action as a class action for purposes of settlement is a practice well supported by prior precedent, and constitutes no evidence whatsoever of any collusion. Based upon the entirety of the record, the Court finds that there was no collusion in connection with this settlement.

G. *Findings Regarding the Ability of Defendants to Withstand A Greater Judgment.* The Court finds that Liberty National Life Insurance Company's statutory net worth is \$327,000,000, according to the last statutory statement filed by Liberty National with the Alabama Department of Insurance prior to the Fairness Hearing. The Court notes that there is also a \$10,000,000 liability insurance policy insuring Liberty National which has been the subject of a claim for coverage by Liberty National with respect to this litigation. The Court finds that claim for coverage has been denied by the insurer, and that the matter is presently in litigation. The Court concludes that the chances of recovery by Liberty National under this insurance policy must be deemed speculative for purposes of this settlement, but in any event would not alter this Court's opinion of the settlement.

With some 400,000 named insureds (plus their additional insured family members) in the class, even an award of \$1,000 each would far exceed Liberty National's statutory net worth. Moreover, if one were to assume a succession of large individual punitive damage judgments, such a scenario would not only exhaust the availability of funds from which class members and later individual suits could be compensated, but would also eliminate the insurance coverage Liberty National provides not only to its cancer insurance policyholders, but to its holders of life insurance policies, accident policies, and all other Liberty National insurance policies.

Without adjudicating the merits, the Court further finds that there is a substantial risk that a succession of individual "pattern and practice" punitive damage suits

on these claims, if even a few were successful, could have the effect of placing Liberty National in receivership or rehabilitation proceedings long before its total assets are depleted. The Court further finds for the purposes of settlement that, pursuant to the Due Process Clause of the United States Constitution and the principles set forth in *Green Oil* and similar authorities in other jurisdictions, if individual damage suits were successful, there is a virtual certainty that before each of the class members insured under the approximately 400,000 cancer policies at issue had an opportunity to bring a suit against Liberty National to a final judgment, Liberty National would be ruled to have been punished to the maximum amount constitutionally permissible for the alleged common conduct, and therefore immune from any further liability for punitive damages. The Court finds that if some class members pursuing their individual lawsuits were able to obtain substantial verdicts against Liberty National for punitive damages, at some point the balance of the later class members would be unable to obtain any punitive damages, even if Liberty National had funds to pay those claims. The Court must observe that if only 327 of the class members pursuing individual claims received \$1,000,000 in punitive damages (as did the plaintiff in *McAllister*), the total net worth and assets of Liberty National would be exhausted, and at some earlier time the Due Process "curtain" would have fallen (and probably receivership or rehabilitation proceedings instituted).

As parent of Liberty National, Torchmark is a released party under the settlement. And generically, Torchmark, to the extent it is alleged to be an entity "in concert with Liberty National" in Liberty National's



alleged cancer policy exchange programs, would be enjoined under the settlement from perpetuating or participating in any future cancer exchange programs. Even assuming that Torchmark was "in concert with" Liberty National, Torchmark by being enjoined would have parted with consideration in support of its release as "parent."

Moreover, while some objectors have intimated that Torchmark may have somehow profited from Liberty National's conduct by virtue of its ownership of the outstanding stock of Liberty National, any such profit by Torchmark was necessarily derivative of the profits made by Liberty National. The Court has previously found and hereby reaffirms that the cost and value of this settlement removes and exceeds any and all profit or gain which Liberty National Life could possibly have received from the alleged cancer exchange programs, and that the cost and value of the settlement, together with the strong deterrent effect of the broad and sweeping injunctions set forth in the settlement and the spectre of contempt created thereby, are more than sufficient consideration for the release set forth in the settlement. The Court notes that it is standard practice for a defendant to insist upon, and the plaintiff to provide, a release of all affiliates of the defendant in connection with a typical settlement of outstanding claims (see e.g. *Grimes v. Vitalink Communications Corp.*, \_\_\_ F.3d \_\_\_, 1994 W.L. 70482 (3rd Cir. March 9, 1994)), and the Court expressly finds the release set forth in the settlement to be fair. This Court expressly finds that this settlement would be equally fair, reasonable and adequate if Torchmark were a named defendant,

with no further enhancement of the relief provided by the Settlement.

Torchmark's other acts or omissions sought to be developed in the evidence do not justify the imputation of liability or the piercing of the Liberty National corporate veil to reach Torchmark. Based upon the discovery conducted on this issue and the entire record before this Court, the Court finds that there is no substantial basis upon which Torchmark could be held liable for the conduct here at issue, and that the value of the settlement to the class far outweighs any possibility of successful pursuit of any such claim. Cf. *In re: Silicone Gel Breast Implant Products Liability Litigation*, 837 F.Supp. 1128 (N.D. Ala. 1993); *In re: Birmingham Asbestos Litigation*, 619 So. 2d 1360 (Ala. 1993); *Mussick v. Moring*, 514 So. 2d 892 (Ala. 1987); *First Health, Inc. v. Blanton*, 585 So. 2d 1331 (Ala. 1991).

In *McAllister*, a similar pattern and practice fraud claim arising out of the cancer policy exchange programs of Liberty National, a judgment for the defendant Torchmark was entered despite the availability of abundant information concerning Torchmark which was revealed to this Court. The *McAllister* record contains numerous unsuccessful efforts to sustain the fraud claim against the parent Torchmark.

In sum, the Court is of the opinion and finds that this Court would have ordered no greater modification to the proposed settlement, if Torchmark had been a party to this litigation. The release of Torchmark does not render the settlement unfair. Deletion of Torchmark from the

release would render the settlement void, and therefore is not in the best interests of the Class.

11. *Findings Regarding No Opt-out Provisions of the Settlement.* The Court hereby finds that the predominant relief provided for in this settlement (and the predominant relief justified and desirable for the class as a whole) is equitable relief for purposes of Rule 23(b)(2). The Court finds that while much of the equitable relief has a punitive effect, particularly in that the equitable relief extends to persons whose claims might otherwise be barred by various legal defenses, it remains equitable for purposes of Rule 23(b)(2). The Court finds that, assuming the allegations of the complaint to be true, Liberty National has acted on grounds generally applicable to the class, thereby making appropriate final equitable and injunctive relief with respect to the class as a whole, and that the nature of the interest of the class members and the nature of the settlement, and the fact that the vast majority of class members have not suffered cancer and have not suffered any denial of benefits, make this action appropriate for certification pursuant to Alabama Rule of Civil Procedure 23(b)(2). Cf. *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So.2d 415 (Ala. 1982), cert denied, 461 U.S. 938 (1983); *Penson v. Terminal Transport Company*, 634 F.2d 989 (5th Cir. 1981); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 502-08 (5th Cir. 1981); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Robertson v. National Basketball Association*, 556 F.2d 682 (2nd Cir. 1977); *Nottingham Partners v. Nottingham Dana*, 564 A.2d 1089 (Del. 1989); *Nottingham Partners v. TransLux Corp.*, 925 F.2d 29 (1st Cir. 1991).

While the Court finds that this action satisfies the requirements of Rule 23(b)(2) separate and apart from whether or not it satisfies the requirements of Rule 23(b)(1), this Court in its Order of February 4, 1994, the entirety of which is hereby made final and incorporated by reference herein, found that the requirements of Rules 23(b)(1)(A) and 23(b)(1)(B) are also met. The Court hereby reaffirms all findings and conclusions made in its order of February 4, 1994.

This Court is of the opinion and finds that to permit opt-outs is not required under the circumstances of this case; is not in the best interests of the Class; and would create a risk of a race to the courthouse by those permitted to opt-out in an effort to obtain for themselves alone the entirety of the constitutionally permissible punitive recovery in one or a few individual actions, and would result in the Settlement being declared a nullity, thereby depriving all class members of the substantial benefits offered by the settlement.

The Court finds that the settlement is fair, reasonable and adequate, and that the provisions precluding opt-outs by class members are also fair, reasonable and adequate considering the totality of the record and of the circumstances of this case. The Court expressly finds that settlement of this class action on a no-opt-out basis is valid in all respects and is in the best interests of the class as a whole.

12. *Findings Regarding The Scope Of the Release.* As is customary, the Settlement contains a release of class members' claims. Compare *Nottingham Partners v. TransLux Corp.*, 925 F.2d 29 (1st Cir. 1991); *Grimes v. Vitalink*



*Communications Corp.*, \_\_\_ F.3d \_\_\_, 1994 W.L. 70482 (3rd Cir. March 9, 1994). Some of the objectors have suggested that the release is too broad in that the settlement might be construed to release claims beyond the scope of this litigation and the "cancer policy exchange programs" conducted by Liberty National. The release relates to "all claims, causes of action and liability . . . in any way based upon or related to any allegation of fraud, misrepresentation, concealment, failure to disclose or other tortious conduct or breach of duty . . . regarding (1) the alleged cancer policy exchange programs, (2) any other transaction resulting in the issuance of a new policy providing cancer coverage for a Class Member previously insured under an old policy, or (3) the failure to offer or issue any Class Member a new policy. . . ."

The Court finds that the release is intended to cover and does in fact cover any frauds or other claims which arose out of transactions involving the exchange (or offer to exchange) of (or failure of Liberty National to offer or exchange) "old policies" for replacement with "new policies" (as defined in the Stipulation), including but not limited to (i) any representations made to insureds under old policies that may have induced them to exchange existing coverage for new policies; (ii) any claim by old policyholders that their premiums increased because other old policyholders exchanged their old policies for new policies and those new policies were placed in a separate experience or rating pool; (iii) claims based upon failure to offer a particular insured under an old policy the opportunity to exchange it for a new policy; and (iv) any other claim based upon any aspect or effect of the alleged cancer exchange programs or any transaction

involving such an exchange or of the alleged cancer policy exchange programs, including any subsequent exchanges by classmembers from one new policy to another. The Court further finds that the release is not intended to cover, and does not cover, representations, suppression or other conduct unrelated to the cancer exchange programs.

The Court retains jurisdiction to enforce the permanent injunction against assertion of Released Claims provided for in the proposed settlement and which will be issued by this Court in conjunction with its approval, so that any further disputes regarding the scope of the release can be resolved by an appropriate motion for relief from the permanent injunction or from the release at such time as this Order is adjudicated on appeal (or the time for appeal has expired).

While the release is broad, the broad and substantial relief afforded by this settlement, after modification at the insistence of this Court, including the substantial equitable relief and the monetary amounts being paid by Liberty National to or for the benefit of the Class Members, would not be available if it did not effect a final and complete resolution of any claim of Class Members relating in any way to the cancer exchange programs or to any transaction involving the exchange of (or failure to exchange) old policies for new policies. The release is due to be enforced as written and agreed to by the parties in the Stipulation, and as herein set forth.

13. *Findings Regarding Contacts Between Class Claims And State Of Alabama.* The Court finds that this litigation has significant contacts, and a significant aggregation of

contacts, with the State of Alabama. Liberty National's principal place of business is in Birmingham, Alabama. Of the more than 3,400 employees of Liberty National, at least 1,500 full-time employees are employed in the State of Alabama. It has more full-time employees in Alabama than in any other single state. Liberty National's bank accounts used for disbursements of funds for payroll and for payment of insurance claims are all located in the State of Alabama. Similarly, as of August 29, 1986, a total of 396,712 old cancer policies were in force or in the grace period, of which approximately 220,338 of the named insureds had an Alabama address as of the date the class notice was mailed.

All Liberty National insurance policies of any kind are issued from the State of Alabama, and all applications for such insurance are processed by Liberty National's home office in the State of Alabama. Of the total amount of premiums collected by Liberty National in 1992, approximately 48% of the those premiums were collected from residents of the State of Alabama. All premiums for any insurance policies issued by Liberty National are ultimately remitted to Liberty National in Birmingham, Alabama. Premiums notices for all Liberty National insurance policies are mailed from Alabama. The bylaws of the Board of Directors of Liberty National are maintained in the State of Alabama.

The new policies at issue in this litigation were designed and developed by Liberty National personnel in the State of Alabama. Finally, in the event that Liberty National became the subject of rehabilitation proceedings, those rehabilitation proceedings would, pursuant to the Alabama Insurance Code, take place in the State of

Alabama under the regulatory authority of the Alabama Department of Insurance.

Assuming that, as claimed, the conduct involved here was a company-wide scheme to defraud concocted in the upper levels of Liberty National's management (which Liberty National denies), then such a scheme clearly would have been concocted and put in motion in the State of Alabama.

## II. CONCLUSIONS OF LAW

Based upon all of the evidence before the Court and with due regard for the foregoing findings of fact and the application of the controlling legal principles, and based on this Court's familiarity with and consideration of the entire record of this proceeding, the Court has reached the following conclusions of law:

1. Maintenance of this suit as class action for purposes of settlement of the claims asserted in this action for the benefits of class members is appropriate and satisfies all requirements under Rule 23(a), Rule 23(b)(1)(A), Rule 23(b)(1)(B), Rule 23(b)(2), Rule 23(c), and Rule 23(e). The standards for class certification are more easily satisfied for purposes of settlement of a class action. *See e.g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (F.D. Ohio 1992).

2. This action satisfies all four prerequisites to class certification set forth in Rule 23(a) of the Alabama Rules of Civil Procedure, namely numerosity, commonality, typicality, and adequacy of representation.



3. The class certified by this Court is sufficiently numerous that joinder of all members would be impractical and perhaps impossible. The instant class consists of thousands of present and former policyholders and insureds under approximately 400,000 cancer insurance policies issued by Liberty National, which is clearly a sufficient number to meet the numerosity requirements of Rule 23(a)(1). Charlie Frank Robertson is a member of the class certified by the court. His live testimony at the Fairness Hearing demonstrated to the Court he was an adequate representative with claims typical of the class. Although the courts have held that "the test for typicality, like commonality, is not demanding," the commonality and typicality requirements are satisfied in this case under any standard. See e.g., *Forbush v. J.C. Penney*, 994 F.2d 1101, 1006 [sic] (5th Cir. 1993); *Schipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993), cert. denied 114 S.Ct. 548 (1993). Charlie Frank Robertson's claims arise from the same alleged corporate scheme and pattern and practice of events that give rise to the claims of all other class members, are allegedly based upon the same general corporate motive as the activities complained of by other class members, and are based upon the same general legal theory of a pattern and practice of "company-wide" fraud. Based on the applicable legal authorities, including those cited in the briefs submitted by class counsel and by Liberty National, the Court concludes that typicality and commonality requirements are satisfied. The Court further finds and concludes that the settlement itself shows that the interests of all class

members have been fully considered in a fair and reasonable overall settlement. See *Jennings Oil Company v. Mobile Oil Corp.*, 80 F.R.D. 124, 128-29 (S.D.N.Y. 1978).

4. The Court concludes that the Named Plaintiff and his attorneys have adequately represented the Class. The Court specifically concludes that the Class Representative has common interests with the unnamed members of the Class; that the Class Representative has vigorously prosecuted the interests of the Class through qualified counsel; and that the requirement of adequate representation has been fully and completely satisfied in this case. See, e.g., *Gonzales v. Cassady*, 574 F.2d 67, 72 (5th Cir. 1973); *In re. Corrugated Antitrust Litigation*, 643 F.2d at 212; H. B. Newburg, *Newburg on Class Actions*, § 11.27A (2d. 1985).

5. The Court has previously found, and hereby reaffirms the conclusion, that this action is appropriate for certification pursuant to Rule 23(b)(2) of the Alabama Rules of Civil Procedure. The Court concludes that, assuming the allegations of the complaint to be true, Liberty National acted or refused to act on grounds generally applicable to the class, thereby making the final injunctive relief and corresponding declaratory relief appropriate with respect to the class as a whole. The Court concludes that the fact that the complaint sought certain monetary relief, and the class settlement provides certain monetary relief in addition to the class-wide injunctive and equitable relief and releases monetary claims, does not preclude certification pursuant to Rule 23(b)(2). See, e.g., *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So.2d 415 (Ala. 1982), cert. denied, 461 U.S. 938 (1983); *Penson v. Terminal Transport Company*, 634 F.2d 989 (5th Cir. 1981); *Nottingham Partners v. Dana*, 564 A.2d

1089 (Del. 1989); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 502-08 (5th Cir. 1981); *Nottingham Partners v. TransLux Corp.*, 925 F.2d 29, 31-32 (1st Cir. 1991); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971). As the Court has previously found, and hereby reaffirms, injunctive and other equitable relief is the predominant relief justified under the circumstances of this case, and the predominant relief afforded by the settlement. Therefore, the Court concludes that final certification and approval of this settlement pursuant to rule 23(b)(2) is appropriate.

6. The Court concludes that this action is also appropriate for certification pursuant to Rule 23(b)(1) for purposes of settlement, and that the requirements of Rule 23(b)(1)(A) and 23(b)(1)(B) are satisfied on the facts of this case. The Court incorporates by reference and makes final the findings and conclusions previously set forth in the Court's Order of February 4, 1994. Based upon those findings and conclusions, which are hereby reaffirmed and made final by the Court, the Court concludes that certification of this class action settlement pursuant to Rule 23(b)(1)(A) and Rule 23(b)(1)(B) is appropriate.

7. The Court concludes that because this class action meets the requirements of Rule 23(b)(1) and 23(b)(2), certification pursuant to Rule 23(b)(3) would be inappropriate. The Court concludes that the res judicata effect given to judgments rendered in class actions under 23(b)(1) and 23(b)(2) is superior; that certification under Rule 23(b)(3) would not be in the best interests of the class as a whole or the class members; that certification pursuant to Rule 23(b)(3) would endanger the legal interests of the class as a whole; and accordingly, that certification pursuant to Rule 23(b)(3) is inappropriate. See

e.g., *Wetzel v. Liberty Mutual Insurance Company*, 508 F.2d 239, 252 (3rd Cir. 1974), cert denied, 421 U.S. 1011 (1975).

8. The Court concludes that the right to opt-out is not required by Rule 23, the United States Constitution or the Alabama Constitution for purposes of this class action settlement. To the extent opt-out is available at all in a class action certified under Rule 23(b)(2), the granting or denial of opt-out is discretionary with the Court. See e.g., *Penon v. Terminal Transport Company*, 634 F.2d 989 (5th Cir. 1981). In the exercise of its discretion, this Court concludes that an opt-out under the circumstances presented by the entirety of this record would be detrimental to the interests of the class members and the class as a whole. This conclusion is bolstered by the inherent conflicts that would ensue between class members in individual punitive damage suits if opt-outs were permitted, as demonstrated by the live testimony of objectors' counsel Champ Lyons, Jr., at the Fairness Hearing.

9. The Court expressly concludes that the granting of opt-out rights in this class action is not required and is neither appropriate nor desirable. This Court would reach the same conclusion whether the Court proceeded under Rule 23(b)(1) alone, Rule 23(b)(2) alone, or, as the Court has done, under both Rule 23(b)(1) and Rule 23(b)(2). The Court has given due consideration to the authorities cited by the objectors, including *Holmes v. Continental Can Co.*, 706 F.2d 144, 155-56 (11th Cir. 1983), and the Court concludes that this class is sufficiently cohesive, that there is a sufficient jural relationship between and among the members of the class, and that the claims of the class members are sufficiently homogeneous that opt-out is unnecessary and inappropriate.



10. The Court concludes that any grant of opt-out privileges to any class members would be inconsistent with the resolution of the claims of the class as a whole pursuant to Rule 23(b)(2) and Rule 23(b)(1). If opt-out were permitted, a few class members who opt-out, if successful in their individual lawsuits, could receive an early trial and would no doubt attempt to recover punitive damages for the entire pattern and practice of conduct here, to the detriment of remaining class members. Indeed, as the Court previously concluded, and hereby reaffirms, such a scenario poses a substantial threat to the interests of the class as a whole if the merit of the claims is what plaintiff and the objectors contend, in that there is the potential for complete destruction and all chances of punitive or other recovery to the remaining class members, as well as a potential for loss of all insurance coverage any class members may have with Liberty National.

11. The Court concludes that the denial of opt-out privileges does not violate either the Due Process or jury trial guarantees of the Alabama Constitution or the United States Constitution, or violate Rule 23 of the Alabama Rules of Civil Procedure. As a matter of law, the Court concludes that no plaintiff has a right to punitive damages. Moreover, Rule 23(b)(1) and Rule 23(b)(2) have often been applied by the Courts of virtually every state and federal courts. Constitutional challenges to class action litigation or settlement pursuant to Rule 23(b)(1) and Rule 23(b)(2) have repeatedly been rejected. *See e.g., Williams v. Burlington Northern, Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987); *Elliott v. Weinberger*, 564 F.2d 1219, 1229 n. 14 (9th Cir. 1977); *Nottingham Partners v. Dana* supra; *Nottingham Partners v. TransLux Corp.*, supra; *Wetzel v.*

*Liberty Mutual Insurance Co.*, supra; *Kincade v. General Tire & Rubber Co.*, supra; *Robertson v. National Basketball Association*, 556 F.2d 682, 685-86 (2nd Cir. 1977); *see also, Pension v. Terminal Transport Co.*, 634 F.2d 989 (5th Cir. 1981). Class action settlements permissibly may preclude the opportunity for jury trial just as Rule 56 and Rule 12 of the Alabama and Federal Rules of Civil Procedure, and other procedural mechanisms, may result in the preclusion of a jury trial, without violating the state or federal constitutions.

12. The Court concludes that the form and method of notice given to class members in connection with the proposed class action settlement satisfies all legal requirements of Rule 23 and all constitutional requirements of Due Process. Such notice constitutes the best notice practicable under the circumstances, and is sufficient to effect individual notice to all class members who can reasonably be identified through reasonable effort. Even though Rule 23(c)(2) does not technically require notice in class actions of the type at issue here, *see e.g., Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974), the class notice at issue here was fully sufficient to satisfy those requirements. The class notice properly identified the plaintiff class and sufficiently described the terms of the settlement so as to alert members with adverse viewpoints to investigate and to come forward, object and be heard.

13. The Court concludes that Liberty National, class representatives and Class Counsel had no obligation to inform unnamed class members or objectors of the settlement negotiations. *See e.g., Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 154-56 (S.D. Ohio 1992).

14. The Court concludes that a class action settlement may release not only the claims alleged in the complaint and before the Court, but also claims which could have been alleged by reason of, or in connection with, any matter or scheme or facts set forth or referred to in the complaint. Even where a court does not have the power to adjudicate a claim, it may still approve release of that claim as a condition of the settlement of an action before it. *See, e.g., In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991); *Huguley v. General Motors Corp.*, 999 F.2d 142, 145 (6th Cir. 1993), *Grimes v. Vitalink Communications Corp.*, \_\_\_ F.3d \_\_\_, 1994, W.L. 70482 (3rd Cir. March 9, 1994).

15. The Court concludes that the practice of stipulation to certification for the limited purpose of settlement is well-supported by prior precedent and does not impugn the fairness of the settlement in any respect. *See, e.g., In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 177-78 (5th Cir. 1979), cert. denied 452 U.S. 905 (1981); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 464-466 (1974); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992); *In re. Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223 (5th Cir. 1981); *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449 (N.D. Ala. 1974), *affirmed* 511 F.2d 1400 (5th Cir. 1975).

16. The Court concludes that there is no requirement that out-of-state plaintiff class members/objectors have "minimum contacts" with the State of Alabama in order to be bound by the class action settlement at issue here. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985). *See also, Hansberry v. Lee*, 31 U.S. 32, 40-41

(1940). There is no constitutional requirement that out-of-state plaintiff class members be given the opportunity to opt out of a 23(b)(2) class action. *Shutts*, 472 U.S. at 812, n. 3.

17. The Court concludes the State of Alabama has significant contacts and a significant aggregation of contacts with the claims asserted by each member of the class, and the State of Alabama has compelling state interest in this action, thereby making application of Alabama law to this class action neither arbitrary nor unfair. *See e.g., Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 821-22 (1985). However, even if the substantive laws of other states were applied, this Court's conclusions would not change.

18. The Court concludes that the proposed settlement is a reasonable compromise of the claims of the class and its members, is fair and reasonable and, as modified, is adequate. The Court finds that approval of this settlement is in the best interest of the class. The Court concludes that this settlement achieves a definite and certain result for the benefit of class members which is preferable to continuing litigation in which class members must necessarily confront and overcome many obstacles, the prospect of an uncertain result, and the prospect of any claim for punitive damages being cut off after an award to the first few litigants, and other uncertainties.

19. The Court concludes that the proposed settlement as modified is and must be considered fair, reasonable and adequate in all respects, and in the best interest of the class as a whole and of class members. Considering



the nature of the litigation and all of the prevailing circumstances, the Court would detrimentally jeopardize a substantial recovery if the Court denied approval. The Court concludes that the settlement is due to be and is hereby approved as modified, and that the injunctions provided for thereby are due to be issued in order to protect the interests of the class as a whole, effectuate the settlement, and protect the jurisdiction of this Court over the subject matter of the action and the settlement.

20. The Court concludes that the settlement was reached by the parties after several months of arms-length negotiations, that the overall fairness of the settlement as modified demonstrates the absence of collusion and the adequacy of representation, and that the settlement as modified represents a fair and valid compromise between the competing positions of the plaintiff and the plaintiff class, on the one hand, and the defendant and released parties on the other.

21. The Court concludes that the named parties and their counsel have successfully brought this difficult and complex litigation to a prompt and fair conclusion, on terms and conditions which this Court concludes are fair and reasonable to the class and defendant Liberty National alike, having due regard for the risks, hazards and expense which continued litigation would entail. The Court concludes that by reaching the settlement at an early stage of the litigation, the parties have commendably reduced the costs connected with this litigation, and that the parties have further reduced the cost through efforts at informal discovery which the courts have long commended. *See, e.g., Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977).

22. The Court concludes that Class Counsel have accurately and ably evaluated the legal, factual and remedial issues and obstacles involved in this extremely complex litigation, and thereby reached a proposed settlement which this Court could have approved as being fair, reasonable and adequate without modification, but which was substantially improved for the protection of class members by way of modifications proposed by the Court and accepted by Class Counsel and other parties.

23. Based on the findings and conclusions set out hereinabove, and in this Court's February 4, 1994, Order and Judgement Conditionally Approving the Class Action Settlement, proposing modifications to the Settlement, which modifications the Court understands will be accepted by named plaintiff and Class Representative, Class Counsel, Liberty National and its counsel if no further modifications are made, this Court will enter a final judgment in the form of the Order and Final Judgment attached hereto immediately upon the formal written acceptance of the Court's February 4, 1994, modifications.

24. All objections and motions of objectors not previously ruled upon are hereby overruled. For the reasons set forth in Liberty National's written opposition, which opposition is incorporated herein by reference, all petitions by objectors' counsel for fee awards are denied and overruled. The Court finds that no objector or counsel for any objector has enhanced the settlement. The Court's February 4, 1994, modifications were not ordered on the basis of any objection, but on the basis of the Court's own independent review of the settlement. The objectors and

their counsel continue to object to the settlement despite the modifications. No applicable legal authority has been cited in support of a fee award to objecting counsel in a private class action settlement proceeding. In fact, to award counsel for objectors a fee would place them in an irreconcilable financial conflict with their clients on appeal.

25. Class Counsel's petition for an award of attorneys' fees will be addressed in a separate order.

DONE AND ORDERED this 26th day of May, 1994.

/s/ William H. Robertson  
William H. Robertson,  
Circuit Judge

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IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,)   
individually and on behalf )   
of a class, )

Plaintiffs, )

v. )

LIBERTY NATIONAL LIFE )   
INSURANCE COMPANY, )

Defendant. )

CIVIL ACTION  
NO. CV-92-021

ORDER AND FINAL JUDGMENT

A Settlement Hearing having been held before this Court on January 20, 21 and 24, 1994 pursuant to this Court's order of June 16, 1993, as thereafter amended by subsequent orders, to determine whether this Court should prove as fair, adequate and reasonable a settlement of this action upon the terms and conditions of the Stipulation and Agreement of Compromise and Settlement dated June 16, 1993 and executed by all parties, as thereafter amended ("Stipulation" or "Stipulation of Settlement"); it appearing that due notice of said Settlement Hearing was given in accordance with the terms of the aforesaid order; the Court having determined that notice to the Class, as described in the aforesaid order and subsequent orders, was the best practicable notice under the circumstances, and fully complies with all requirements of Due Process, and all requirements of Alabama



Rule of Civil Procedure 23; the respective parties having appeared by their attorneys of record; the Court having received and considered arguments and evidence in connection with the proposed compromise and settlement of the action; the attorneys for the respective parties having been heard; and opportunity to be heard having been given to all of the persons requesting to be heard in accordance with the aforesaid order; and the proposed Settlement and all other matters of record in this action having been heard and considered by the Court; and based on the Findings of Fact and Conclusions of Law set forth in a separate order entered contemporaneously herewith, it is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. For purposes of considering, approving and effectuating the Stipulation of Settlement and to fairly and adequately protect the interests of the members of the class, this Court has previously ordered, and hereby orders and confirms, that this action is to be maintained as a class action pursuant to Ala.R.Civ.P. 23 (b)(2), for a Plaintiff Class consisting of:

All persons who now or in the past were insured under any cancer policy which (1) was issued by Liberty National Life Insurance Company ("Liberty National") on or before August 29, 1986, and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed or was replaced by a different Liberty National

cancer policy after that date; *provided, however*, that (i) any insured who is or was a named plaintiff in any separate lawsuit which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the Class *unless* such lawsuit has been voluntarily dismissed without prejudice on or before the date this Settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the Class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the Class.

2. On February 4, 1994, this Court entered an Order Conditionally Approving Class Action Settlement, the full text of which is incorporated herein by reference. The findings and conclusions set forth in that Order are hereby reaffirmed, and made final, the named parties and their counsel having notified the Court of their acceptance of the modifications to the class action settlement set forth therein. Pursuant to said Order of February 4, 1994, the class action certification pursuant to Rule 23(b)(2) was reaffirmed and the class action was additionally certified pursuant to Rule 23(b)(1)(A) and Rule 23(b)(1)(B) for purposes of settlement, all of which is hereby reaffirmed, incorporated herein by reference and made final.

3. The Court has heretofore found and hereby finds and reaffirms for purposes of settlement that the Named Plaintiff is an adequate representative of the Class and that all requirements of Ala.R.Civ.P. 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2) are met. The Court expressly finds for purposes of settlement that the Class is so numerous that joinder of all members is impracticable; that there are questions of law and fact common to the Class; that the claims of the Named Plaintiff are typical of the claims of the Class; that the Class Representative and Class Counsel have fairly and adequately represented and protected the interests of the Class and will continue to do so; that the prosecution of separate actions by individual class members would create a risk of varying or inconsistent adjudications which would establish incompatible standards of conduct for the defendant, and would as a practical matter be dispositive of the interests of other class members or substantially impair or impede their ability to protect their interests; that, assuming the allegations of the complaint (which Liberty National denies) to be true, Liberty National has acted on grounds generally applicable to the class, thereby making appropriate final equitable and injunctive relief with respect to the class as a whole; that the nature of the interests of the class members, the nature of the Settlement, and the fact that the vast majority of class members have not suffered any actual out-of-pocket monetary losses or damages (other than allegations concerning increased premiums) at this time, make this action inappropriate for certification under Ala.R.Civ.P.23(b)(3); and that maintenance of this action pursuant to Ala.R.Civ.P. 23(b)(1)(A),

23(b)(1)(B) and 23(b)(2), separately and severally, is superior to any other method of proceeding with these claims.

4. Subject to the terms and conditions of the Stipulation, as amended and modified, Liberty National Life Insurance Company is hereby enjoined and ordered to perform its obligations under the Stipulation of Settlement (as heretofore amended by the parties, including those modifications set forth in this Court's February 4, 1994 Order Conditionally Approving Class Action Settlement), which Stipulation of Settlement (as so amended and modified) is hereby affirmed and approved in its entirety and incorporated herein by reference. The Court expressly finds that the primary relief provided for by the Stipulation and Settlement, and the primary relief which would be justified by the alleged (but denied) conduct, is injunctive and further equitable relief in the nature of declaratory relief, reformation of certain insurance policies, and ancillary restitution. The provisions in the Stipulation of Settlement for incidental monetary relief and supplemental extracontractual monetary relief are ancillary to the primary equitable and injunctive relief.

5. Subject to the terms and conditions of this Court's Order of February 4, 1994 and of the Stipulation of Settlement, as modified and amended, Liberty National Life Insurance Company and its successors and assigns, and all other entities and individuals acting in concert with Liberty National are hereby permanently ENJOINED:

(a) From instituting, engaging or participating in, maintaining, authorizing or continuing any of the alleged cancer policy exchange



programs as defined in the Settlement and Stipulation;

(b) From instituting, engaging or participating in, maintaining or authorizing any future program relating to the exchange, substitution, switching or attempting to exchange, substitute, or switch Liberty National cancer insurance policies whereby the substituted Liberty National cancer policy excludes or limits any benefits that are provided in the replaced Liberty National cancer policy, without full disclosure of the benefits and coverages in the replaced and substituted policies, including disclosure of any benefits in the original policy which are excluded or limited benefits in the substituted policies;

(c) With respect to those Class Members specified in paragraph II-6 of the Stipulation, to provide benefits without monetary limits for claims incurred after June 16, 1993 for radiation, chemotherapy, prescription chemotherapy drugs, and out-of-hospital prescription drugs prescribed in connection with the treatment of cancer under the new policies of such Class Members currently in force, so long as the new policies remain in force and premiums are paid, subject to the terms and conditions of the Stipulation, as amended and modified, and the terms and conditions of this Court's Order of February 4, 1994;

(d) With respect to those Class Members specified in paragraph II-6 of the Stipulation, to reform (or treat as having been reformed) the new policies (as defined in the Stipulation) of Class Members presently in force to provide prospective coverage without monetary limits

(so long as each such new policy is kept in force and all premiums are paid) for otherwise covered radiation, chemotherapy, and prescription chemotherapy drugs administered to the named insured or any covered person under the new policy in connection with the treatment of cancer, and to provide coverage without monetary limits for other out-of-hospital prescription drugs prescribed to the named insured or any covered person under the new policy in connection with the treatment of cancer, for claims incurred subsequent to June 16, 1993, such reformation to be implemented upon the later of (i) the expiration of the time appeal from this Order and Final Judgment, or (ii) the final binding affirmance of this Order and Final Judgment in the event of any appeal or other petition for review, if any appeal or petition for review is taken regarding this action. No additional premium shall be charged for this additional coverage; provided, however, that claims paid under this additional coverage or waiver may be considered as claims experience for the purposes of future premium adjustments, subject to the provisions of paragraph II-8 of the Stipulation. This paragraph shall require reformation to be implemented upon the later of the expiration of the time for appeal from this Order or final binding affirmance in the event of appeal, with an effective date of June 16, 1993, such that all claims incurred after June 16, 1993 will be eligible for the reformed coverage.

(e) From increasing the premiums on the old cancer policies or the new cancer policies of Class Members prior to the later of (i) January 1, 1996; (ii) one year from the date of this Order; or (iii) one year after entry of judgment or final

order by the Alabama Supreme Court, without regard to whether any petition for certiorari or appeal to the United States Supreme Court is filed with respect thereto;

(f) With respect to those Class Members specified in paragraph II-10 of the Stipulation, to make restitution to the named insured for otherwise valid benefit claims accrued under the new policies of Class Members on or before June 16, 1993, based upon 150% of the amount by which the total benefits that would have been received under the class member's "old policy" for the same overall cancer treatment exceeds the total benefits actually paid by Liberty National for the class member's overall cancer treatment under the "new policy," subject to the terms, conditions and procedures set forth in paragraphs II-10 and II-11 of the Stipulation, as amended by this Court's Order of February 4, 1994.

(g) With respect to those Class Members specified in paragraph II-6 of the Stipulation, from applying or enforcing any exclusion of benefits for out-of-hospital prescription drugs prescribed in connection with the treatment of cancer and from applying or enforcing any monetary limits or caps upon the benefits for radiation, chemotherapy or prescription chemotherapy drugs which are contained in any new policy owned by such Class Member, to any claim incurred after June 16, 1993, subject to the terms and conditions of Stipulation and this Court's Order of February 4, 1994.

(h) Subject to any regulatory jurisdiction of any insurance department within the states in which Liberty National's cancer policies were

approved for issuance, to pool the experience of all Class Members in all states and file all future premium rates based on the pooled claims and premiums experience of all Class Members in all states in which the old and new cancer policies were approved for issuance, and to use its best efforts to obtain acceptance from all state insurance departments to allow Liberty National to pool the experience of all Class Members for rate making purposes.

The provisions of subsections (a), (b) and (e) of this paragraph 4 shall be effective unless and until such time as this Order and Final Judgment is vacated, modified, reversed or remanded on appeal, in whole or in part. All other aspects of the final relief set forth in this Order shall be automatically stayed in the event of appeal as contemplated by the terms and conditions of the Stipulation.

6. Consistent with the Findings of Fact and Conclusions of Law entered contemporaneously herewith, and subject to this Court's retention of jurisdiction to enforce this Order and the Stipulation of Settlement, as amended and modified, all claims asserted in this action, including those claims asserted in Named Plaintiff's Amended Complaint, and all claims which have been or could be asserted (by intervention or otherwise) by or on behalf of any Class Member relating to the "alleged cancer exchange programs" or the "Released Claims" (as those terms are defined in the Stipulation), are DISMISSED in their entirety on the merits, with prejudice, and defendant Liberty National (and the related beneficiaries of the Release set forth in Section III of the Stipulation of Settlement) are hereby RELEASED from all claims, actions, causes of action and liabilities which were or could be



asserted by or on behalf of any Class Members, which relate to the alleged cancer exchange programs or the Released Claims as defined in the Stipulation of Settlement. The Release provided in Section III of the Stipulation is hereby approved and made effective and incorporated herein by reference.

7. Named Plaintiff and each and all Class Members are hereby permanently ENJOINED, precluded and barred from filing, initiating, asserting, maintaining, pursuing, or continuing or participating as a litigant (by intervention or otherwise) in any action, whether an individual lawsuit or class action, in any court, asserting any of the claims dismissed herein or any of the Released Claims as defined in the Stipulation of Settlement; *provided, however*, that neither this injunction, nor the settlement benefits provided by the Stipulation of Settlement described in this Order, shall apply to any individual who was a named plaintiff in any separate action filed on or before March 10, 1993 which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer policies, unless said action has been voluntarily dismissed without prejudice prior to the date of this Order and Final Judgment.

8. The Escrow Agreement entered into June 16, 1993, between Liberty National and the First Commercial Bank attached as Exhibit "E" to the Stipulation is approved and its terms and conditions are ratified by the Court, and the amendment to said agreement provided for by the Court's Order dated March 28, 1994 requiring escrow of an additional \$10,000,000.00 is hereby ratified

and approved by the Court. Subject to the terms and conditions of the Stipulation, Liberty National is hereby enjoined to implement and honor the terms of the Escrow Agreement, as amended, and the Stipulation, as amended and modified, with respect to each of the \$2,000,000 and \$9,000,000 monetary relief funds.

9. All Proof of Claim Forms submitted on or before December 20, 1993 by each Class Member entitled under the Stipulation (and the instructions contained in the Proof of Claim Form) to submit a Proof of Claim Form shall be processed in the manner as designated in the administrative procedure set forth in the Stipulation of Settlement. Subject to the terms of the Stipulation, persons who did not submit a Proof of Claim Form on or before January 20, 1994 shall be forever barred from claiming or receiving any of the restitution or any other monetary benefits set forth in paragraphs II-9, II-10 and II-12 of the Stipulation, as amended and modified. Subject to the terms of the Stipulation, Proof of Claim Forms submitted after December 20, 1993 but on or before January 20, 1994 shall be processed in accordance with the Stipulation after all timely Proof of Claim Forms have been processed, subject to Liberty National's right to object to the Proof of Claim Form as being untimely. Any such objection to the timeliness of Proof of Claim forms shall be filed and ruled upon once all timely Proof of Claim forms have been processed. The Proof of Claim Form attached to the Notice is hereby finally approved as to form and content.

10. There being no reason for delay, the Clerk of the Court is hereby directed, pursuant to Ala.R.Civ.P.54(b), to enter this order as a FINAL JUDGMENT. Subject to the

terms and conditions of the Stipulation, Plaintiff's counsel, heretofore approved by the Court as Class Counsel, being Jere Beasley, Beasley, Wilson, Allen, Main & Crow, P.C. and Walter R. Byars, Steiner, Crum & Baker, are jointly awarded \$4,500,000 in full payment of all attorneys' fees which sum has been paid by Defendant Liberty National Life Insurance Company to the Escrow Agent in accordance with the terms of the Escrow Agreement and the Stipulation of Settlement, and \$35,000 in full payment of all expenses incurred or to be incurred by Class Counsel in this action, which shall be paid within 5 days to the Clerk of Court, to be disbursed upon expiration of the time for appeal or final binding affirmance in the event of appeal. Said attorneys fees together with interest or investment proceeds shall be disbursed in accordance with any subject to the terms and conditions of the Stipulation and the Escrow Agreement.

11. Subject to and in accordance with the terms of the Stipulation, court costs are taxed against Defendant Liberty National Life Insurance Company, which costs shall include all fees and expenses of actuarial or other experts or consultants employed by Class Counsel. Class Counsel shall submit an invoice for such expenses to Liberty National which Liberty National shall pay within five days, of receipt, unless the amount of the invoice or Class Counsel's entitlement under the Stipulation in any respect in which case such dispute shall be resolved by this Court pursuant to its retention of continuing jurisdiction. Pursuant to Paragraph 12 hereof, the Court reserves jurisdiction to award additional fees and expenses set forth in the Stipulation of Settlement.

12. This Court reserves and maintains continuing jurisdiction over all matters relating to the Settlement or the consummation of the Settlement; the validity of the Settlement; the construction and enforcement of the Settlement and any orders entered pursuant thereto; any disputes which may arise between Class Members with respect to the persons entitled to receive the proceeds of any amounts payable to Class Members under the Stipulation; and the entry and enforcement of this FINAL JUDGMENT, including, in the event of reversal, vacation or modification of this final judgment, jurisdiction to revoke this Order and Final Judgment in its entirety and to reinstate all claims dismissed or claims, actions, causes of action and liabilities released pursuant to paragraph 5 hereof; to tax court costs (subject to the terms and conditions of the Stipulation) which shall consist of all expenses for the Class notice, fees and expenses of actuarial or other experts or consultants, fees and expenses of the Special Master, and all other matters pertaining to the Settlement or its implementation and enforcement.

13. All pending motions of objectors and intervenors not previously ruled upon are hereby denied and overruled. The Court incorporates by reference herein its specific rulings on pending motions set forth in the transcript of the May 19, 1994 hearing. The Court further incorporates by reference herein and makes final its Order of February 4, 1994.

The Court has set forth its Findings of Fact and Conclusions of Law in a separate order entered contemporaneously herewith.



Done this 26th day of May, 1994.

/s/ Wm. H. Robertson  
CIRCUIT JUDGE

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## IN THE SUPREME COURT OF ALABAMA

February 16, 1996

- 1931603 Guy E. Adams, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931604 Thomas Beck, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931605 David Cox, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931606 Vernon E. Adamson, Sr., et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931607 Darlene Skinner, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931610 David L. Lynd, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931611 Lucille Williams, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931612 Opal M. Soesbe v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931613 John Henry Lamey, Jr., et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)

- 1931614 Douglas C. Hammac, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931615 Artemus Lane Nobles, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931616 Florence W. Clayton, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)
- 1931617 Larry L. Andrews, et al. v. Charlie Frank Robertson and Liberty National Life Insurance Company. (Barbour: CV-92-021)

#### NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM – Hooper, CJ., Maddox, Houston, Kennedy, Ingram and Cook, JJ., concur; Shores and Butts, JJ., recused.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 16 day of Feb., 1996.

/s/ Robert G. Esdale  
Clerk, Supreme Court of Alabama

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#### **NAMES OF PETITIONERS**

Case No. 1931603 – *Guy E. Adams, et al. v. Charlie Frank Robertson, et al.*:

Guy E. and Alice S. Adams  
Retha B. Attaway  
Herman and Beatrice Bateman  
Edna F. Brock  
Hubert and Ruth Bullington  
Dr. Neil Capper  
Billy and Anna Clausen  
John and Mary Day  
Arthur and Peggy Dickinson  
Edith E. Fellows  
Mary L. Fowler  
Leonard H. Griffith  
Sara E. Griffith  
Willard C. Griffith  
Ellis and Joyce Harvell  
John and Hazel Jefferson  
Gussie and Willa Johnson  
Lawrence A. Johnson  
Johnnie and Bertha Jones  
Jabie I. and Johnny Lane  
Fred and Linda Lewter  
James R. McGahagin  
Martha Massengale  
Seraphim Massengale  
David W. Mooney  
David and Catherine Nelson  
Floyd E. and Delores H. Nelson  
Ethel M. Offord  
Rebekah Oliver  
Geneva Parden  
Mary Perez  
Vernon and Estelle Permenter  
Arnold F. and Almitta Pitt



Rosa Lee Prosser  
 Alex and Doris Rivers  
 Ola Saxon  
 Joseph and Joy Savell  
 Brenda Sexton  
 John and Mary Stockman  
 Jean M. Sullivan  
 James R. and Linda S. Swilley  
 Dawn R. Tubb  
 John and Grace Turner  
 Colonel and Jeanne Weaver  
 Catherine H. Whigham  
 James and Betty White  
 Thomas White, as Executor for Edna M. White  
 Sheila White  
 Tommy White  
 Bertha Williams  
 Melvin and Rita Williams

Case No. 1931604 - *Thomas Beck, et al. v. Charlie Frank Robertson, et al.*:

Thomas Beck  
 William Bostic, Jr.  
 Grover and Mary Bowdin  
 Rufus W. and Laura A. Burch  
 Ken and Harriett Brown  
 William and Peggy Chappelle  
 Clarence W. Coleman, Jr.  
 Cooper and Mazel Cowart  
 Esther Crabtree  
 John W. and Susan Curtis  
 William E. and Sue K. Davis  
 Norman Dicken  
 Debra Dickerson  
 Charles B. and Mary E. Duckworth  
 James and Ruth Elmore  
 Michael D. and Teresa Evans

James Faircloth  
 Lynn Fillingim  
 C. Henry and Patricia Fox  
 Emanuel A., Sr. and Gloria Gazzier  
 Carolyn C. Gray  
 Stella L. Gregory  
 John and Evelyn Harris  
 Elmore and Willie D. Harvison  
 Jimmy Harvison  
 Ruthie Harvison  
 Nettie Helton  
 Opal Herm  
 Pelham and Jewel Hollingsworth  
 Tony and Anita Hopper  
 Billy and Kathy Hoven  
 Cathy Howard  
 Andrew and Dwanna Howle  
 Andrew J. and Betty Howle  
 Ann Jacobson  
 Jimmy G. and Eloise James  
 Thomas and Aravictoria B. Kelly  
 James W. Kilgore  
 Clyde and Barbara Kohn  
 George and Mary Kountz  
 W. Guy LeCrory  
 Darrell and Michelle Ladnier  
 Joseph G. and Wanda R. Loftin  
 Paul and Beth Marshall  
 Michelle Mayberry  
 James and Sandra McGuff  
 George and Hazel Nicholas  
 Malcolm and Vivian Nicholas  
 Martha Partridge  
 Glenn and Margie Perkins  
 Thomas R. and Margaret L. Pierce  
 Diana Rampey  
 Felix and Lori Reynolds

Ernest Rhone  
 John M. Sirmon  
 John W. and Maybelle Sirmon  
 Bessie R. Tipp  
 Cecil R. and Peggy Trawick  
 A.C. Vickery  
 Margaret Vickery  
 Louis and Caroline White  
 Lena O. and Arthur Williams  
 Kimberly Wilson  
 Rodger and Paulette Wilson  
 Mr. and Mrs. Franklin Wood  
 Franklin Wood, Jr.

Case No. 1931605 - *David Cox, et al. v. Charlie Frank Robertson, et al.*:

David & Elizabeth Cox  
 Julius E. & Doris Davis  
 William J. Miller  
 Susan Q. Miller  
 George W. Mears  
 Brenda M. Foster  
 Jessie E. Mears  
 Edward E. Russ  
 Charles E. Jones  
 James M. Jones  
 Andrew J. Stewart, Jr.  
 Peggy L. Winchester  
 Jerry & Marian H. Davis  
 Ernest L. Howze  
 William W. Howell  
 Billy R. & Arlene Huggins  
 John E. Harrington, Jr.  
 James Patrick & Anne McKeown  
 Sheila C. Hubbert  
 William J. Barbour  
 Robin E. Barbour

Arthur Perry Barbour  
 Carolyn D. Barbour  
 Elton M. & Elizabeth D. Gunnin  
 Noel & Rosemary Mount  
 Kathy L. Wilson  
 Dorothy A. White  
 Patricia S. & James A. Strength (deceased)  
 Naomi W. Strength  
 Nolan P., Jr. & Carol E. Cooper  
 Everitt & Deborah E. Averitt  
 Richard, Sr. (deceased) & Jessie H. Beckish  
 Patricia Sauce  
 Joseph & Claudia Wittner  
 Calvin E. Bosarge  
 Johnny M. & Josephine Farrior  
 Martin J. Powers  
 Diane D. Drew  
 Bonnie J. Rhodes Sprinkle  
 Martha L. & Brady S. Eubanks  
 William L. & Dorothy Darnell  
 Beatrice B. Waite  
 John H. Bull, Jr.  
 Jerald & Margaret Jaye  
 James E. Cook  
 Arland A. Cook  
 Bernice Finlay  
 Carlos & Delores R. Williams  
 N.H. & Joan Bankston on behalf of Bradford Smith & Amy Smith  
 Betty Turner  
 Norma Jean Wittner  
 Myra Jean Wittner  
 Claudia Wittner as Guardian of Veronica Lynn Turner  
 Raymond & Joan N. Young



Case No. 1931606 - *Vernon E. Adamson, Sr., et al. v. Charlie Frank Robertson, et al.*:

Mr. and Mrs. Vernon E. Adamson, Sr.  
 Sybil R. Blackwell  
 Marsha N. Britton  
 Vera K. Bynum  
 Mr. and Mrs. Charles D. Byrd  
 Mr. and Mrs. James L. Calcote  
 Mr. and Mrs. William W. Chunn  
 Edwina C. Clearman  
 SaMartha B. Colvin  
 Janet Cook  
 Kenneth H. Cook  
 Helen H. Day, Ind. and as Executrix of Est. of  
 Raymond H. Day, Dec.  
 Ronald V. Dixon  
 Louise N. Dunaway  
 Carol B. Golden  
 Joseph R. Havard, and the Est. of Brenda L. Havard  
 Myrtle O. Hawman  
 Mr. and Mrs. Mark L. Howell  
 Mr. and Mrs. Foster L. Jones, Jr.  
 Jewel N. Jones  
 Ellen R. Lesley  
 Eunice W. Long  
 Myrna B. Matthews  
 Mr. and Mrs. Allen K. Middleton  
 Alberta D. Overstreet  
 Vivian C. Overstreet  
 Mr. and Mrs. Maurice E. Perkins, Jr.  
 Betty T. Phillips  
 Mr. and Mrs. George R. Reeves, Sr.  
 Mr. and Mrs. James R. Reeves, Sr.  
 Helen R. Rhodes  
 Mr. and Mrs. Carlton D. Robertson  
 Mr. and Mrs. Allen H. Ryals  
 Dorothy H. Scoggins

Thomas G. Scoggins, Jr.  
 Mildred L. Smith  
 Daniel A. Warren  
 Dorthy A. Warren  
 Randal S. Warren  
 Timothy J. Warren  
 Mr. and Mrs. Max L. Yates

Case No. 1931607 - *Darlene Skinner, et al. v. Charlie Frank Robertson, et al.*:

Darlene Skinner  
 Walton K. Skinner  
 Judy K. Gann  
 Jodie E. Gann  
 Teresa Mize, Ind. and as Executrix of Est. of Carol  
 Thomason  
 Jean Stoltz  
 Lena Latham  
 Howard F. Smith  
 Alfred Hancock  
 Elvis D. Ray  
 Magoline Ray  
 Randall L. Garner

Case No. 1931610 - *David L. Lynd, et al. v. Charlie Frank Robertson, et al.*:

David L. Lynd  
 Elizabeth S. Lynd  
 Pat DeSantis  
 Angela DeSantis  
 James V. Stowe  
 Wilanne S. Stowe  
 Juanita R. Stowe  
 Wesley R. Beech, Sr.  
 Margaret Beech  
 Donald Rayford Williams  
 Olga N. Williams  
 Mickie E. Ray

Willie J. Ray  
 Albert E. Ray  
 Cora Q. and Patrick Ray  
 Donald L. Allen  
 Mary J. Allen  
 William A. Barnes  
 Alma G. Barnes  
 Grace Biondolillo  
 Sallie M. Conway  
 Deborah M. Cox  
 Tommy R. Cox  
 Della M. Finlay  
 Lore M. Franklin  
 Douglas W. Howell  
 Daisy D. Howell  
 Lucille J. Jackson  
 Theodore W. Jockisch  
 Francis L. Jockisch  
 Lois N. Klaas  
 Phillip Bruce Lumpkin  
 Gloria W. Lumpkin  
 Floyd J. Miller  
 Annie G. Miller  
 James E. Mitchener, Sr.  
 Sally F. Mitchener  
 Hubert R. Odom  
 Catherin J. Odom  
 Thomas Wayne Smith  
 Sue Ann Smith  
 Warren G. Stanley, Jr.  
 Vicki H. Stanley  
 Norris F. Woodard  
 Lois M. Woodard  
 James E. Wooley  
 Linda C. Wooley  
 Ashton B. Cannon  
 Carolyn Cannon

Leslie C. Collings  
 Edna W. Collings  
 Lottie Trest  
 William C. Trest  
 William D. Knapp  
 Ruby Knapp  
 Ruby Walker  
 Jaime Phillips  
 Augustus L. Smith  
 Patricia L. Smith  
 Donald E. Smith  
 Karen K. Smith  
 David A. Rose, Sr.  
 Kay I. Rose  
 Essie Lee Taylor  
 Henry D. Whigham  
 Gloria Whigham  
 Ruby M. Taylor  
 Hiram R. Burge  
 William C. Smith  
 Jean M. Smith  
 Gail Pruitt  
 Bennie F. Baker  
 Gladys R. Baker  
 Joann B. Voivedich  
 Julian Tedder  
 Betty B. Tedder  
 Raymond Guy  
 Deborah Guy  
 Wyone Guy  
 Charles R. Gilbert  
 Delores M. Gilbert  
 Susan Trest Price  
 Rayford Hinton, Jr.  
 Judith C. Hinton  
 Robert Venek  
 Telecia Paulk (f/n/a) Telecia Gibbs



James P. Cazalas, Sr.  
 Brenda S. Cazalas  
 Leo C. Crain  
 Sandra E. Crain  
 Jesse M. Turner  
 Hugh F. McCoy  
 Byron D. Ray, Jr.  
 Lynn M. Ray  
 Joseph H. Lofton  
 Carel D. Bush  
 James F. Willis, Sr.  
 Anita D. Willis  
 Louie B. and Joye Spear  
 Kevin Morrow as Executor of Carol Morrow  
 Deborah R. McDonald as Executor of Largene C.  
 Rodgers

Case No. 1931611 – *Lucille Williams, et al. v. Charlie Frank Robertson, et al.*:

Lucille Williams  
 James C. Griswold  
 Joseph F. Watson  
 Betty Knowles  
 Neal Knowles  
 Aline Orso  
 Randy Touchstone  
 Phyllis Touchstone  
 Joseph Touchstone  
 Gloria Touchstone  
 June L. Barrow  
 Betty Terry  
 William Terry  
 Elizabeth Miller  
 Verna L. Cornelius

Case No. 1931614 – *Douglas C. Hammac, et al. v. Charlie Frank Robertson, et al.*:

Mr. and Mrs. Douglas C. Hammac  
 Pamela & Terry Knight  
 Mr. and Mrs. Victor Lazzari, Jr.

Case No. 1931615 – *Artemus Lane Nobles, et al. v. Charlie Frank Robertson, et al.*:

Artemus Lane Nobles  
 Anah Allen  
 Roger Bayles  
 Susan Davis Brown  
 Kristopher Kyle Dailey  
 Oscar H. Goree, Jr.  
 Ann Harden  
 Jeffrey H. Harden  
 Wilbur Harden  
 Charles Johnson  
 Mary Johnson  
 Irma Schaefer  
 Richard T. Schaefer  
 Betty Yarbrough  
 Sibley McKenzie  
 Loretta McKenzie  
 John R. Sellers

Case No. 1931616 – *Florence W. Clayton, et al. v. Charlie Frank Robertson, et al.*:

Florence W. Clayton  
 Thurman F. Clayton  
 Wayne F. Clayton  
 Iveynelle Clayton  
 Woodrow Johnston  
 Gladys D. Johnston, Deceased  
 Eula Mae Books

Case No. 1931617 - *Larry L. Andrews, et al. v. Charlie Frank Robertson, et al.*:

Larry L. Andrews  
 Jane M. Ankerson  
 Rosalie B. Ankerson  
 Edward J. Arata, Jr.  
 August T. Bozant  
 Teresa R. Bozant  
 Mr. and Mrs. Thomas Brettel  
 Joseph E. Broughton  
 Susan L. Brown (Lewis)  
 Mr. and Mrs. Michael Burgess  
 Madeline K. Burnes  
 Linda D. Butts  
 Richard S. Butts  
 Robert C. Butts  
 William H. Butts  
 Shirley & Jesse Carlisle  
 James P. Cofield  
 Barbara Cooper  
 Lillie J. Cooper  
 Pat Estes  
 Ruth F. Granade  
 Daphne P. Kelley  
 Douglas E. Kelly  
 Berry Kitchens  
 Doris Hewett  
 John S. Hewett  
 Mr. and Mrs. Robert Holifield  
 Mr. and Mrs. George Lewis  
 Ms. Shawn M. Lewis  
 Mr. and Mrs. Byron Lundy  
 Lucille McPherson  
 Kevin McPherson  
 Catherine A. McRae (Beck)  
 Lucille L. McRae  
 John A. McRae

Monica G. Merifield  
 Catherine M. Parker  
 Estate of Ms. Jewell Pierce, Deceased  
 David Pitt  
 Mr. and Mrs. Melvin Pitt  
 Mr. and Mrs. Michael Presley  
 Rhonda L. Pulliam  
 Jerry L. Pulliam  
 Douglas Revere  
 Richard Russell  
 Nelma G. Shewmake  
 Curtis L. Shewmake  
 Cleveland Smith  
 Mr. and Mrs. Gary Smith  
 Cecilia R. Street  
 John D. Turner, II

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December 6, 1993

"SEND THEM A MESSAGE"

By David Frum

THE COURTHOUSE in Clayton, Ala. is a low, modern cube on a dusty square lined with a handful of shops eking out a living. It's the last place you might think to look if you wanted to make some serious legal money. But as Sam Walton demonstrated, a go-getter can make a lot of money out of these small southern towns. Meet Jere Beasley, the Sam Walton of litigation.

In the past five years Jere (pronounced Jerry) Beasley has won tort verdicts and settlements totaling at least \$ 66 million – and almost certainly more – in this little county courthouse. Beasley generally charges the plaintiff lawyers' going rate of 33% of whatever he wins. True, some of his verdicts have been reduced later. Still, Beasley has probably earned, before expenses and taxes, a bare minimum of \$ 8 million from cases brought in Clayton. Not bad for a court responsible for the legal business of just 10,000 rural Alabama souls.

Beasley filed cases almost as fast as Sam Walton opened stores. By FORBES' count Beasley filed just 2 cases in the Clayton courthouse in 1989. Two years later the number was 8; in 1992, 17; and in 1993, more than 20 so far. And Beasley says the number is much higher.

How a lawyer like Jere Beasley can do so well for himself in a hamlet like Clayton speaks volumes about how the U.S. tort industry works. Clayton is the capital of

the western division of rural Barbour County. (It's an oddity of history that a few of Alabama's 69 counties are divided in half.) The son of a poor farmer, Jere Beasley grew up in Clayton and got his law degree from the University of Alabama in 1962. He was elected lieutenant-governor of Alabama in 1970, on a ticket with George Wallace, who also, as it happens, comes from Barbour County. Beasley served two terms, ran for governor in 1978, and lost. At which point he decided to practice a little law.

One of Beasley's specialties is hauling big out-of-state and foreign corporations into the Clayton courthouse and then convincing a jury that the greedy corporations have done grievous injury to Beasley's local client. "Send them a message" was the slogan of the Wallace presidential campaign in 1968, and Beasley urges Clayton's juries to send a message to corporate headquarters in New York, Michigan, Finland or Japan by socking it to the defendants' bottom lines.

Beasley won his biggest Barbour County success in 1990, in *Baker v. Harper*, the biggest of what are known around Alabama as the Union Mortgage cases. A contractor, Harper, made home repair loans to poor and uneducated families near Clayton, and secured the loans with mortgages issued by the Union Mortgage Co., a Dallas firm owned by Skopbank of Finland. The homeowners fell behind in their payments and decided they had been overcharged for the repairs. Enter Beasley. On behalf of five of the homeowners, he convinced a Clayton courthouse jury that the contractor had used fraud to obtain the mortgages – and that the evil foreign-owned bank

owed his clients more than their homes back. The jury agreed, and awarded Beasley's five families \$ 45 million.

By all accounts Beasley is a great advocate, simultaneously smart and folksy. But he's also got a certain home court advantage in the Clayton courthouse. It's not just that he was raised there. His sister-in-law publishes the local newspaper, the Clayton Tribune, and county circuit judge Robertson is his former law partner and old friend. There are only about 6,000 jurors eligible to serve in Clayton court, and Beasley seems to know them all.

Asked whether it would be a good idea for an out-of-town defendant to get local counsel, Judge Robertson laughs: "It would pretty much amount to malpractice not to."

This is not to say that Clayton is the only place that Beasley wins. In October he won a \$ 40 million tentative settlement of a class action suit in Eufaula, a pretty old town where the courts for the richer and more populous eastern half of Barbour County are located. Judge Robertson presides in Eufaula as well.

Toting up his record since 1989, Beasley admits that 51 of his cases have resulted in jury verdicts or settlements of \$ 1 million or more, sometimes much more. Away from Barbour County, Beasley won \$ 13 million against Sears, Roebuck in Lowndes County; \$ 15 million against General Motors in Marengo County; and \$ 26 million against Ford Motor Co. in Green County. All three cases were ultimately disposed of for somewhat less, either because the award was reduced by the Alabama Supreme Court or because Beasley settled to avoid an

appeal. But the reductions were from some very high bases.

Beasley is famous for dragging defendants to Clayton. One method: In a case involving Chicago-based United Insurance Co., he sued the local agent at the same time he sued United. If he had sued the big company alone, the defendant could have removed the suit to federal court, where the jury would have been drawn from all over southern Alabama, and Beasley would have lost his home court advantage.

At the last minute, Beasley dropped the local agent from the case. That way he could assure the jury that whatever damages it awarded would come from the treasury of a faceless corporation far away, not from the pockets of a local man. By then, it was too late for the big insurance company to get into federal court, because federal law bars cases that are more than a year old.

If they get stuck in Clayton, Beasley's defendants usually clamor to settle. Japanese tractor manufacturer Kobuta, for example, settled a wrongful death action earlier this year for \$ 10 million, after five days of trial in Clayton. Says one attorney who settled with Beasley: "There's no way I would have paid the money I did for this case in my home county."

The way things are going, Beasley, who's 58, is set to become one of the nation's wealthiest lawyers, if he isn't already. Right now, he says, he has more than 350 lawsuits pending all around the state. Whoever said there's no money in small towns didn't know about Jere Beasley.

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March 20, 1995

WHERE THE TORTS BLOSSOM; WHILE WASHINGTON  
DEBATES RULES ABOUT LITIGATION, DOWN IN  
ALABAMA, THE LAWSUITS GROW THICK AND WILD

Gregory Jaynes

THEY WERE ABOUT TO PICK A JURY to hear a civil suit in rural Alabama the other day, and the home-side lawyer for the plaintiffs assured the jury pool of farmers and sewing-machine operators, stock clerks and bookkeepers that he didn't want "to pry into your life," but said he wanted to know, "Is there anyone here who doesn't believe in filing a lawsuit for any reason? Is there anybody here who simply doesn't believe a jury should award punitive damages in any amount?" It was pretty quiet, and no wonder.

This was in Clayton, one of two seats (the other is Eufaula) of Barbour County, an ordinary little county that has become nationally recognized as tort hell. The lawyer was Jere Beasley, who was once the Clayton High School quarterback and twice the lieutenant governor. Now 59 but still thick as an antebellum column in the neck, Beasley has a reputation for taking the side of ordinary folk against big corporations and bringing them to their knees, lightening their pocketbooks by the millions. Now he smiled at the prospective jurors, 100 people or so; everybody knew of him.

Next it was the other attorney's turn, Bob Bradford from Montgomery, representing an insurance and finance

company. Said Bradford: "I come from a small community. I am sure there are folks that, if I went to high school with and they were on my jury, they might lean a little my way. Would any one of you tend to lean a little bit toward Mr. Beasley?" The judge was William Robertson, 51, a former law partner of Beasley's, and a protege in Little League baseball ("He was a hero we looked up to," the judge says of Beasley). In less than 24 hours the defendants - accused of violating state laws by requiring borrowers to take out life insurance policies to cover the amounts of their loans - had folded and settled 45 cases out of court for \$ 4.1 million. By Beasley standards they got off light: if it had gone to the Barbour County jury, God knows the size of the wheelbarrow they would have needed to haul away the verdict money.

Last week, as the House of Representatives voted for legal-reform measures as part of a Republican pledge to stanch the tide of frivolous lawsuits and to rein in society's litigious ways, the anecdotal evidence of the reformers' nightmares was nowhere stronger than in Barbour County. Last year juries in Alabama awarded \$ 200 million in punitive damages, some of it in cases where actual loss was minuscule compared with the damages. "Alabama is off the charts," said George Priest, a Yale University professor of law and economics. "Lawsuits used to be about restitution. Now Jere Beasley goes into court and not only gets the money back; he gets \$ 25 million in punitive damages. There is no other county in the U.S. like Barbour County."

To stay that kind of litigious stir, not just in Barbour County but also in the heart of the national citizenry, the House approved 1) a "losers pay" bill, which would

require the party that had first rejected a settlement and then won a judgment for a lower amount to cover the opposing side's legal fees; 2) a bill tightening requirements for bringing securities-fraud lawsuits; and 3) a bill that would cap punitive damages in product-liability cases at \$ 250,000 and allow judges to sanction parties that bring frivolous product-liability lawsuits. The bills were welcomed by Big Business and the insurance industry, which have sought such laws for more than a decade. Corporations, said Representative Henry Hyde of Illinois, provide employment for the country. Hyde, who is the chairman of the House Judiciary Committee, told the New York Times: "We shouldn't make an enemy or adversary of them just to satisfy some populist urge."

Opposing the legislation was the 60,000-member Association of Trial Lawyers of America, which characterized the reforms as "propped up by distortion and lies." In Alabama, Beasley said, with protection like this his vanquished foes "would have clicked their heels and chirped like larks." Ralph Nader was a particularly vociferous opponent. Nader said only \$ 3 billion annually passes from losers to winners in insured payouts when companies are sued, pointing out that \$ 3 billion is less than a year's profits for many large companies - Ford or GM, say. "Pick any company," said Nader. "There's more in profits for one company after taxes than all the quadriplegics and brain damaged get from product liability or civil settlements." Marc Galanter, director of the Institute for Legal Studies at the University of Wisconsin, called the bills "the triumph of folklore over research. There is no great rising tide of litigation in the U.S."

Oh, yes, there is, said the Republicans, whose debatable argument had 1 of every 5 American small businessmen canceling new products out of fear of product-liability lawsuits. According to Wyatt Co., a Washington consulting firm, the cost to companies of settling suits against corporate officers rose 39%, to an average \$ 4.6 million, in the period from 1986 to 1994. Furthermore, the average cost to industries for hiring outside counsel was \$ 967,000.

If that doesn't break your heart, why, the Girl Scouts of Washington have to sell 87,000 boxes of cookies a year just to pay their liability insurance. Leave us Girl Scouts out of this, the group said. All right, the reform lobbyists said, if not a Girl Scout, then we will give you a little girl in pigtails who would like to play Little League ball this year, if it weren't for all the lawsuits. The full-page advertisement in the Washington Post said DON'T LET HER SEASON END IN A LAWSUIT. But the horse the conservatives rode hardest was the case of the elderly woman who was awarded \$ 2.9 million in a judgment against McDonald's after she burned herself with a McDonald's cup of coffee (the payoff was reduced on appeal to \$ 480,000). As Suffolk Law School professor Michael Rustad told TIME, despite the perception out there of vast monies changing hands in these cases, only 10% of punitive-damages awards of more than \$ 10 million are paid; 90% are reduced or reversed.

The Senate is expected to take a meaner look than the House did at all three measures, spending some months to make alterations. The White House opposed all the bills.



Meanwhile, here stands Alabama's My Cousin Vinny scenario, a deserving target for criticism from every corner. The median punitive-damage award in Alabama is \$ 250,000, three times the national average. Median figures aren't available for Barbour County, but some individual ones are. For example, Willie Ed Johnson, a young nursing-home orderly, claimed that the Mercury Finance Co. of Northbrook, Illinois, inflated his used-car loan by \$ 1,000, charging him 26% interest and taking advantage of him and thousands of others nationwide to make more than \$ 1 billion in profits; last Aug. 4 a Barbour County jury awarded Johnson \$ 90,000 in compensatory damages and \$ 50 million in punitive damages. Beasley told the jury it was time to send a message. (The case was reportedly settled for less than \$ 1 million.)

Beasley alone accounted for \$ 110 million in punitive-damages awards last year (Barbour County is known as the "Beasley Triangle," the place where corporate America bleeds for the public good). He has won astronomical judgments again and again - against, among others, Prudential Insurance and GM - to the point where other plaintiffs' lawyers are carping privately about such success (the lawyer's take is usually about 30% or more). But backbiting doesn't faze him. "Being in politics sort of conditioned me to being called names," Beasley told TIME. "I wish if people didn't like me, they'd tell me to my face instead of spreading rumors about me. Maybe they're just scared of me."

"Beasley," says Birmingham defense lawyer Sam Franklin, who knows him well, "almost makes jurors think it is their civic duty to award millions to the plaintiff." For his part, Robertson, the only circuit judge in the

county (he has seen 88 Beasley cases filed since 1993), seems to view the court as a way of policing consumer areas where the state lacks personnel. "The deterrence of fraudulent conduct is left, in Alabama, to the punitive-damage system," he noted in one ruling, asking that part of the judgment go to the state insurance department, which has a \$ 2 million budget to monitor a \$ 6 billion industry. Ten insurance companies last autumn announced plans to pull out of Alabama.

"The juries are telling these companies that we want you to come down here and do business with us," says Robertson, "but if you cheat us, we'll make you pay. That's what's been happening here. You better do what you say you're going to do. Where you find that people are less educated, less business-sophisticated, it is more likely they will be misled by agents. You're supposed to be able to trust your insurance agent, just like you would your lawyers, your preacher or your football coach."

As for accusations of partiality toward Beasley, the judge says, "The jury gives the verdict." And the plaintiff's lawyer says, "Every verdict I got, my client deserved - and could have been settled for less."

"We didn't have a chance," one shirtless (figuratively) insurance executive said after an Alabama jury shot his company down. Reformers in the state embraced last week's congressional action, saying somebody has to pour water on these juries before more concerns bolt and run. "Businesses here are honestly scared of what will happen to them if they are sued," said Sid McDonald, a businessman from Arab (pronounced A-rab) and chairman of Alabama Voters Against Lawsuit Abuse. "They do

not believe they can get fair treatment in the Alabama court system, especially at the appellate level. Corporate America thinks Alabama's judiciary is on a witch-hunt for out-of-state targets. People are suing for millions over frivolous matters. The attitude is, Sue anybody for anything for any amount of money. What we've got in Alabama is a lawsuit lottery."

"If you're a company and you haven't done anything wrong, you don't have anything to worry about," Beasley was saying recently, "but if you did do something wrong, watch out." Not that Beasley needs the business. He has 500 cases pending. And if Congress wants to meddle in how he goes about representing his clients, well . . . "I'll work with whatever system I have to work with. It won't affect me one iota."

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February 28, 1996 Wednesday, EVENING UPDATE  
EDITION

# ABUNDANCE OF LAWSUITS EARN ALABAMA TITLE: 'JACKPOT JUSTICE'

By Phillip Rawls, Associate Press.

DATELINE: EUFAULA, Ala.

Ford dealer Randall Greene keeps his desk cluttered with the tools of his trade: sales brochures, price guides, parts lists - and piles of lawsuits.

Greene had 24 suits filed against him last year. This year the count stands at five, so far.

It's part of doing business in rural Barbour County, which used to be best known as George C. Wallace's birthplace but is now gaining a national reputation for its multimillion-dollar jury verdicts.

"Everybody's digging - 'Who can I sue?' " Greene said. "That's why they refer to it as the Alabama lottery. People go to Florida and Georgia and buy jillions in lottery tickets, hoping to strike it rich. This is how they hope to strike it rich here."

Plaintiffs' lawyers say the judgments are fair for consumers wronged by giant corporations in a state with little regulatory control against fraud.

Critics call the state a haven for "jackpot justice," where poor, backwater folk on juries hammer companies with ridiculously high punitive damage awards.



"Our small business members cannot thrive and create more jobs for the people of this state because of the fear of frivolous lawsuits," said Clark Richardson, president of the Business Council of Alabama.

The case that has come to symbolize the trend is a \$2 million punitive damage judgment - reduced from \$4 million on appeal - won by a Birmingham doctor who sued because he was not told his new 1990 BMW had been repainted before he bought it.

The U.S. Supreme Court heard arguments in the case last year and could lay down new guidelines to determine when jury awards are excessive.

One of Greene's used car sales led to a 1994 lawsuit - and a \$50 million verdict - against the finance company, Mercury Finance. The suit over finance charges eventually was settled out of court for about \$1.5 million, Greene said.

Alabama courts upheld more than \$125 million in punitive damage verdicts statewide from 1987 to 1994. That was more than neighbors Florida, Georgia, Mississippi, Tennessee, North Carolina, South Carolina and Kentucky combined, Richardson said.

And as the verdict amounts increased, so did the lawsuits. In Barbour County alone, the number of lawsuits filed each year doubled between 1991 and 1995.

The Alabama Legislature is considering caps and other laws to curb the suits and soaring verdicts. But a special session on the issue failed Feb. 2 as business interests accused Republican Gov. Fob James of offering a toothless compromise.

Former Lt. Gov. Jere Beasley, who has handled many of the lawsuits, said the trend in Barbour County and across Alabama is a product of the state's weak insurance and banking regulations and a lack of consumer protection laws.

Beasley won the \$50 million Mercury Finance verdict, secured a \$10 million settlement against Kubota tractors in 1993, and settled many other lawsuits for smaller amounts.

Robert J. Norrell, director of the University of Alabama's Center for Southern History and Culture, said the increase in lawsuits is rooted in the past.

"There is a longstanding hostility of rural people against banks and insurance companies," he said.

For the county's 25,000 residents, the per capita personal income is \$16,000, with 25 percent living in poverty and 44 percent of the adults lacking a high school education.

The furor over lawsuits upsets Dixie Spivey, who says they can be worthwhile.

Her husband, Durwood, was killed in 1990 when a small Kubota tractor flipped on him at their Barbour County farm. When the same tractor nearly overturned on her son, she sued, citing its lack of a roll bar that could stabilize the tractor.

Kubota offered her a \$10 million settlement, which she accepted only after the company removed a stipulation that she keep quiet about the tractors.

"Sometimes you have to hit a person in a way they have got to listen," she said.

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NOT YET RELEASED FOR PUBLICATION.

LIBERTY NATIONAL LIFE INSURANCE COMPANY

v.

Edith N. McALLISTER.

1931163.

Supreme Court of Alabama.

Feb. 24, 1995.

On Application for Rehearing April 7, 1995.

William J. Baxley and Joel E. Dillard of Baxley, Dillard and Dauphin, James W. Gewin and Michael R. Pennington of Bradley, Arant, Rose & White, Birmingham, Joseph C. Sullivan, Jr. and David A. Boyett of Hamilton, Butler, Riddick, Tarlton & Sullivan, Mobile, for appellant.

Norman E. Waldrop, Jr. and M. Kathleen Miller of Armbricht, Jackson, DeMouy, Crowe, Holmes & Reeves, L.L.C., Mobile, for appellee.

INGRAM, Justice.

Edith N. McAllister sued Liberty National Life Insurance Company ("Liberty National"), alleging that Liberty National had induced her to switch an older Liberty National cancer insurance policy for a newer, more expensive cancer insurance policy, while fraudulently concealing that the newer policy reduced or eliminated important benefits available under the older policy. The trial court submitted to the jury McAllister's theories of misrepresentation, deceit, and fraudulent suppression. The jury awarded McAllister \$1,000 in compensatory damages and \$1,000,000 in punitive damages. The trial court entered a judgment on the jury's verdict and denied

Liberty National's motions for JNOV, a new trial, or a remittitur. Liberty National appeals.

A jury's verdict is presumed correct and will not be disturbed unless it is plainly erroneous or manifestly unjust. *Alpine Bay Resorts, Inc. v. Wyatt*, 539 So.2d 160, 162 (Ala.1988). In addition, a judgment based upon a jury verdict and sustained by the denial of a motion for a new trial will not be reversed unless it is plainly and palpably wrong. *Ashbee v. Brock*, 516 So.2d 214 (Ala.1987). Because the jury returned a verdict for McAllister, any disputed questions of fact must be resolved in her favor, and we must presume that the jury drew from the facts any reasonable inferences necessary to support its verdict. *State Farm Auto. Ins. Co. v. Morris*, 612 So.2d 440, 443 (Ala.1993). In short, in reviewing a judgment based upon a jury verdict, this Court must review the record in a light most favorable to the appellee. *Continental Cas. Ins. Co. v. McDonald*, 567 So.2d 1208, 1211 (Ala.1990).

Viewed in the light most favorable to McAllister, Continental Cas. Ins. Co., the record suggests the following:

McAllister, a widow, had been a Liberty National policyholder since 1947. In 1982, she purchased a Liberty National cancer insurance policy for herself; she also purchased an identical policy for her daughter. The 1982 policy provided coverage for various costs associated with cancer treatment; these included limited hospital expenses, surgical expenses, and private nursing costs. Of particular importance to this case, however, was the 1982 policy's coverage for expenses stemming from radiation, chemotherapy drugs, and prescription drugs. In the 1982



policy, Liberty National set no maximum limit for coverage of these expenses; therefore, Liberty National agreed to provide total coverage of these expenses.

Evidence at trial indicated that 65% to 80% of cancer patients are treated with radiation, chemotherapy, or a combination of the two. Prescription pain medication, described in trial testimony as the "dominant expense in taking care of long-term cancer patients," is used by 50% of those patients who continue treatment beyond their initial cancer treatment. The price of treatment by radiation, chemotherapy, and related prescription medication is very high. The prescription pain medication can cost up to \$2 per dose; with several doses of different types of medication a day, the costs for a patient may easily reach over \$1,000 a month. The cost of chemotherapy may range from nearly \$700 to over \$1,600 per day of treatment. Radiation and medicine relating to its use may cost over \$3,600 a day during certain periods of the radiation treatment cycle. Expensive prescription anti-nausea and antibiotic medications are also used in these cancer treatments.

In the 1980s, Liberty National developed a steadily increasing amount of expenses stemming from claims under these full-coverage policies. At the same time, Torchmark Corporation, Liberty National's parent corporation, ordered Liberty National to cut its expenses. Liberty National then embarked on a program to persuade its cancer insurance policyholders to exchange the older policies for new cancer policies. These new policies increased coverage or created additional coverage in certain aspects; for example, the new policies provided a \$2,000 cash payment for the first occurrence of cancer and

provided coverage for certain "dread diseases," such as polio and tetanus, that was unavailable under the old policy. However, the new policies limited their coverage to \$500 per day for radiation and chemotherapy treatments and \$8,000 a year for prescription chemotherapy drugs; no coverage was provided for prescription anti-nausea, antibiotic, or pain medicine. One former Liberty National agent who participated in the exchange program stated the following:

"Q. . . . [W]hat were [you] taught you were supposed to do as a Liberty National agent?

"A. . . . We were showed just to highlight the benefits, the first occurrence benefits, the \$2,000 up front and we showed them what they were going to get but we never showed them what they were going to lose.

"Q. . . . [W]ere you taught to ever show them what they were [to] give up?

"A. No, sir.

"Q. Were you taught not to tell them what they were giving up?

"A. Yes, sir.

"Q. Who taught you that?

"A. Sales managers."

In 1987, Rick McLendon, McAllister's Liberty National agent, told McAllister that the new Liberty National cancer policy "was a better policy and had better coverage" than her existing 1982 policy. According to McAllister, McLendon did not tell her that certain

benefits under her 1982 policy would be limited or eliminated in the 1987 policy. McLendon filled out an application for the new policy, and McAllister signed it; McAllister did not review the policy at that time because, she stated, "I trusted him." McLendon gave McAllister a brochure describing the coverage provided by the new policy; while this brochure accurately stated the coverage provided, it made no comparison between the coverage of the 1982 policy and that of the 1987 policy. McAllister also exchanged the cancer policy that she had previously purchased for her daughter. In 1990 and 1991, McAllister again exchanged these policies for newer policies. The record indicates that Liberty National charged higher premiums for McAllister's new policies.

In 1992, McAllister's aunt, Grace Dismuke, was diagnosed with cervical cancer; Dismuke had also owned an older Liberty National cancer policy and had exchanged it for a newer policy. When Dismuke discovered that Liberty National would not cover many of her medical bills under her new policy, she discussed that fact with McAllister, who then compared her new policy with Dismuke's 1982 policy, which was identical to McAllister's 1982 policy. Concerning this comparison, McAllister stated:

"Q. Was that the first time you had ever tried to do that?

"A. Yes.

"Q. What did you look at when you tried to compare them?

"A. I looked at the benefits on the radiation and the chemotherapy and the drugs and realized that I did not have the one hundred percent coverage anymore.

". . . .

"Q. Ms. McAllister, if you had been told at the time that you purchased your 1987 policies that the benefits in the radiation coverage and the chemotherapy coverage and the prescription drug coverage were going to be less under the new policy would you have bought the policies in 1987?

"A. No, I would not."

On appeal, Liberty National first contends that the trial court erred in submitting McAllister's fraudulent suppression claim to the jury. Liberty National argues that the sales brochure its agent McLendon gave to McAllister in 1987 was a full disclosure of all material facts pertaining to the policies, and, therefore, that Liberty National was entitled to a judgment as a matter of law on that claim.

Fraud may be committed by the suppression of material facts. Ala.Code 1975, § 6-5-102, states:

"Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case."

To prove a prima facie case of fraudulent suppression, a plaintiff must show: (1) that the defendant had a duty to disclose an existing, material fact; (2) that the



defendant had actual knowledge of the fact and its materiality; (3) that the defendant suppressed that fact; (4) that the plaintiff's lack of knowledge concerning that fact induced her to act; and (5) that she suffered actual damage as a proximate result of her acting. *Hardy v. Blue Cross & Blue Shield*, 585 So.2d 29, 32 (Ala.1991). A plaintiff attempting to prove fraudulent suppression need not prove an intent to deceive; the plaintiff has only to prove a breach of the defendant's duty to disclose the suppressed facts. *Baker v. Bennett*, 603 So.2d 928 (Ala.1992). The question as to whether a duty to disclose exists is for the jury, "which should consider the relationship of the parties, the value of the particular facts suppressed, and the relative knowledge of each party." *Baker*, 603 So.2d at 935; see also *Cowen v. M.S. Enterprises*, 642 So.2d 453 (Ala.1994). In *Baker*, the Court noted that when one party has superior knowledge of a fact that is unknown to the other party, and the lack of knowledge will induce the other party to act in a manner in which he otherwise might not act, the obligation to disclose is "particularly compelling." *Baker*, 603 So.2d at 935.

The brochure for the new policy given to McAllister made no reference to the 1982 policy. It made no reference to the exchange of the policies. It made no comparison between the new policy and the 1982 policy that the new policy would replace. We hold that, under the circumstances of this case, the jury could find that Liberty National was under a duty to explain to McAllister the differences between the 1982 policy and the 1987 exchange policy before selling her the new policy, either through direct communication by its agents or through its sales brochure. McAllister testified that she had a cordial,

trusting relationship with McLendon and other Liberty National agents. "Every month and sometimes in between," McAllister said, the agents would visit her home to drink coffee and sometimes have dinner. It is obvious from McAllister's testimony that she trusted Liberty National and its agents to sell its policies to her honestly; in other words, to help her understand the differences between her old policy and the new policy. Liberty National had the opportunity to explain the differences between the old policy and the new one, either through proper instruction of its agents or through its sales brochure, but it failed to do so. The sharp reduction in the 1982 policy's coverage of radiation and chemotherapy expenses, along with the elimination of coverage for non-cancer treating prescription drugs, makes the question as to whether Liberty National's 1987 policy brochure was a "full disclosure" of all material facts one of fact, not of law. Therefore, we hold that the court properly submitted this issue to the jury.

Liberty National next asserts that McAllister's claims were barred by the statute of limitations, because McAllister acquired the sales brochure and policies in 1987, more than two years before she filed this lawsuit.

A fraud action is subject to a two-year statute of limitations. Ala.Code 1975, § 6-2-38. However, the fraud claim accrues only when the plaintiff discovers the fraud or when the plaintiff, acting as a reasonable person, should have discovered the fraud. Ala.Code 1975, § 6-2-3; *McGowan v. Chrysler Corp.*, 631 So.2d 842 (Ala.1993); *Fabre v. State Farm Mut. Auto. Ins. Co.*, 624 So.2d 167 (Ala.1993). Whether a party discovered or should have

discovered fraud, for purposes of the statute of limitations, is generally a question of fact for the jury. *Massachusetts Mut. Life Ins. Co. v. Collins*, 575 So.2d 1005 (Ala.1990); *Green v. Wedowee Hosp.*, 584 So.2d 1309 (Ala.1991); *Elrod v. Ford*, 489 So.2d 534 (Ala.1986). "The question of when a plaintiff should have discovered fraud should be taken away from the jury and decided as a matter of law only in cases in which the plaintiff actually knew of facts that would have put a reasonable person on notice of fraud." *Hicks v. Globe Life & Accident Insurance Co.*, 584 So.2d 458, 463 (Ala.1991) (emphasis in original). This Court has stated that "'fraud is discoverable as a matter of law for purposes of the statute of limitations when one receives documents that would put one on such notice that the fraud reasonably should be discovered.'" *Kelly v. Connecticut Mut. Life Ins. Co.*, 628 So.2d 454, 455 (Ala.1993), quoting *Hickox v. Stover*, 551 So.2d 259, 262 (Ala.1989).

We hold that the trial court properly submitted to the jury the question of when McAllister, acting as a reasonable person, should have discovered the facts supporting her fraud claims. Although McAllister had had the Liberty National sales brochure and policies in her possession since 1987, she testified that she did not learn of the coverage reductions of the new policy until 1992, when her aunt contracted cancer and received bills not covered by the aunt's substituted Liberty National policy. It was at that point that McAllister compared the 1982 policy with the new policy. McAllister had no reason until then to question the coverage of her new policy, because, she says, she relied upon McLendon's assurances that the new policy provided "better coverage." The question of

whether a reasonable person in McAllister's situation should have discovered the fraud when she received the 1987 policy and sales brochure, rather than when she compared the policies after her aunt's illness, was a question of fact for the jury. There was no proof that McAllister actually knew of facts that would have put a reasonable person on notice of fraud before 1992; therefore, the trial court did not err on this issue. *Hicks*, supra.

Liberty National next argues that the trial court erred in denying its motion for a change of venue from Mobile County, because of what it deems "adverse publicity" in Mobile County surrounding its cancer policy exchange program.

The most common procedure by which this Court reviews a trial court's ruling on a motion for a change of venue is to petition for a writ of mandamus; however, this is not the exclusive procedure for review of such a ruling. The ruling can also be reviewed on direct appeal. *Elmore County Comm'n v. Ragona*, 540 So.2d 720 (Ala.1989). A determination on a motion for a change of venue is a matter within the sound discretion of the trial court. *Ex parte Gold Kist, Inc.*, 491 So.2d 869 (Ala.1985). After reviewing the record, we conclude that the trial court did not err in denying Liberty National's motion for a change of venue.

Liberty National next argues that the trial court erred in permitting evidence of damage suffered by McAllister's aunt, Grace Dismuke.

The testimony of Dismuke and McAllister concerning Dismuke's experience with her substituted Liberty



National cancer policy simply demonstrated that Dis-muke also had been persuaded to exchange her policy in 1987, and that, when she contracted cancer, the new policy left many of her medical bills unpaid. On the question whether a party committed a particular fraudulent act, proof may be made that the party committed similar fraudulent acts against other persons near the same time that appear to be part of a common scheme to defraud. We have generally held that evidence of other fraudulent transactions is admissible to show fraud, motive, scheme, or intent. *C. Gamble, McElroy's Alabama Evidence* § 70.03(1) (4th ed. 1991); *Kabel v. Brady*, 519 So.2d 912 (Ala.1987). The trial court did not err on this issue.

Liberty National next argues that the trial court erred in denying its motions for a mistrial. It contends that McAllister's counsel failed to timely produce an insurance application made by McAllister to another insurer and that McAllister's counsel made prejudicial comments during closing argument.

Because declaring a mistrial is a drastic measure, this Court will not reverse a trial court's ruling on a motion for a mistrial unless it is absolutely clear that its discretion has been abused. *Wright v. Terry*, 646 So.2d 11 (Ala.1994); *Continental Eagle Corp. v. Mokrzycki*, 611 So.2d 313 (Ala.1992). McAllister's attorneys sent Liberty National's attorneys a copy of the application approximately four days before trial. The record does not indicate a willful failure to produce the application; instead, it appears that McAllister's counsel did their best to timely produce all of McAllister's insurance papers for

defense counsel. The trial court did not abuse its discretion in refusing to declare a mistrial on this basis. Further, after reviewing the comments of McAllister's counsel during closing arguments, we find them not to warrant a mistrial. The trial court did not abuse its discretion in denying Liberty National's motions for a mistrial.

Liberty National next contends that McAllister failed to prove damage as a result of its conduct.

McAllister has never submitted a claim under her substituted Liberty National cancer policy. However, as was stated by this Court in *Boswell v. Liberty Nat'l Life Ins. Co.*, 643 So.2d 580 (Ala.1994), "the insurer cannot be allowed to profit from its fraud simply because the insured is 'lucky' enough never to have to 'use' the coverage." The fraud was complete when the fraudulent transaction occurred; the damage was McAllister's payment of premiums on the substituted policies while receiving reduced coverage or no coverage for certain treatments that had been covered by the earlier policies. This is sufficient damage upon which to base a fraud claim; therefore, Liberty National's argument is without merit. *Boswell, supra*; *Willingham v. United Ins. Co. of America*, 628 So.2d 328 (Ala.1993).

Finally, Liberty National contends that the trial court "failed to give the jury verdict . . . close and meaningful independent scrutiny" after Liberty National moved for a JNOV, a new trial, or a remittitur.

We find this issue to be without merit as well. The trial court conducted a hearing and issued a written order denying the motion for a JNOV or a new trial. In that order the trial court also reviewed the jury's verdict,

pursuant to *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala.1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala.1989); it found that the evidence supported the jury's verdict. This Court's review of the facts of this case indicates that the trial court did not err in refusing to disturb the verdict.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

MADDOX and BUTTS, JJ., concur.

HOUSTON, J., concurs specially.

COOK, J., concurs in the result.

On Application for Rehearing

INGRAM, Justice.

APPLICATION OVERRULED.

MADDOX, HOUSTON, KENNEDY, COOK and BUTTS, JJ., concur.

HOUSTON, J., substitutes an amended special concurrence for that issued on February 24, 1995.

HOUSTON, Justice (concurring specially).

For purposes of the statute of limitations, fraud is "discovered" as a matter of law when one receives documents that would put one on such notice that the fraud reasonably should have been discovered. *Hickox v. Stover*, 551 So.2d 259, 262 (Ala.1989).

Liberty National contends that the essence of Edith McAllister's claim, based on multiple causes of action, is

that Liberty National wrongfully induced her to exchange existing cancer policies for new policies by not disclosing certain monetary limits upon radiation, chemotherapy, and drug benefits under the new policies.

Liberty National's "Exhibit 2" is a brochure given to McAllister in 1987, when she changed policies. This brochure read:

"BENEFITS FOR	WE PAY
" . . . .	. . . .
"Radiation and Chemotherapy	All charges in and out of hospital up to \$500 per day. No maximum lifetime limit.
"Prescription Chemotherapy/ drugs	All charges for cancer fighting drugs and medicines prescribed up to \$8,000 per year. No maxi- mum lifetime limit."

Therefore, if the "essence" of McAllister's claim was as asserted by Liberty National, I would agree that the fraud should have been discovered when McAllister received Liberty National's brochure and I would agree that her claims were time-barred. However, from studying the complaint, as amended, and McAllister's brief, I believe that the essence of her claim was that the insurance agent represented to her "that Liberty National had 'come out with a new cancer policy' which provided 'better benefits and better coverage' " than her existing policies and that the new cancer policy "had been put together by Liberty National to compensate for and cover 'rising medical costs and new cancer treatments which



were being discovered.' " It is without dispute that Liberty National did not furnish McAllister with a comparison of the benefits under her existing policies and the benefits under the new policies. The evidence, viewed most favorably to McAllister, as required by our standard of review, established that Liberty National sought to keep that information from McAllister. Therefore, it was for the jury to determine whether McAllister's claim was time-barred.

This was a "pattern and practice" case, as was *BMW of North America, Inc. v. Gore*, 646 So.2d 619 (Ala.1994). In my special concurrence in *Gore*, 646 So.2d at 630, I wrote:

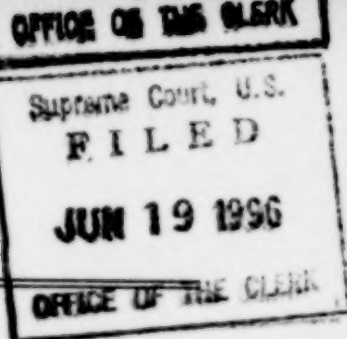
"Because evidence of BMW NA's pattern and practice was introduced in each case, an award of punitive damages in either case based upon this pattern and practice would sufficiently punish BMW NA for this conduct, and any additional punishment of BMW NA for this conduct would have serious problems under the United States and Alabama Constitutions. Some courts have refused to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct. See, e.g., *Dunn v. Hovic*, 1 F.3d 1371, 1385 (3d Cir.1993). However, when a punitive damages award is obviously based upon the totality of a defendant's pattern and practice, as it is in this case . . . , we have in effect held that punishment for this course of conduct by BMW NA in excess of \$2,000,000 violates 'some' substantive due process. I believe that to allow any additional punitive damages award against BMW NA in regard to

the sale of any of the 983 vehicles may violate numerous constitutional rights."

I believe that to allow any additional punitive damages award against Liberty National for the entire "pattern and practice" of conduct upon which McAllister's award was based may violate numerous rights guaranteed Liberty National by the United States and Alabama Constitutions.

---

(2)  
No. 95-1873



In The  
**Supreme Court of the United States**

October Term, 1995

— ♦ —  
GUY E. ADAMS, et al.,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

— ♦ —  
On Petition For A Writ Of Certiorari  
To The Supreme Court Of Alabama

— ♦ —  
**BRIEF OF RESPONDENT IN OPPOSITION**

— ♦ —  
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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the right to opt out of a plaintiff class action certified pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B), *Alabama Rules of Civil Procedure*, is required by the Due Process Clause of the Fourteenth Amendment, where the relief sought and granted in the settlement, and approved by the trial court, provided primarily injunctive and other equitable relief, "not claims wholly or predominately for money judgments."

2. Whether non-resident members of this plaintiff class who have had written notice of the settlement, the opportunity to object, to participate and to be heard, in person or through counsel, who, at the fairness hearing, participated and were heard either through counsel, in person, or both, and objected to and actually litigated the adequacy of representation by the class representative and class counsel and the merits and fairness of the settlement, were denied due process because class members have no right to opt out of the settlement.

## CERTIFICATE OF INTERESTED PARTIES

Petitioners are approximately 400 named members of the plaintiff class composed of policyholders of approximately 400,000 cancer policies insured by Liberty National Life Insurance Company.

Respondents are Charlie Frank Robertson, the plaintiff and class representative of the certified class constituting policyholders of approximately 400,000 cancer policies, and Liberty National Life Insurance Company ("Liberty National"),<sup>1</sup> the defendant and the insurer of those class members. In addition to the parties listed by the petitioner, Torchmark Corporation is the parent corporation of Liberty National.

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<sup>1</sup> Counsel of record for respondent Liberty National elected not to file a response to the Petition for Certiorari. This was based upon the belief that the arguments recited in the Petition are adequately rebutted by the appended opinions of the trial court and the Alabama Supreme Court.

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## BRIEF OF RESPONDENT IN OPPOSITION

Respondent Charlie Frank Robertson, as the class representative of the cancer insurance policyholders of Liberty National certified as a plaintiff class, urges this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the Alabama Supreme Court.

## OPINIONS BELOW

The opinion of the Alabama Supreme Court was rendered on December 22, 1995, and application for rehearing was overruled on February 16, 1996. The opinion of the Alabama Supreme Court has not been published in the official reporter but appears as an appendix to the Petition. The findings of fact and conclusions of law and the order and final judgment of the Circuit Court of Barbour County, Alabama, were affixed as an appendix to the Alabama Supreme Court opinion appended to the Petition.

## JURISDICTION

Jurisdiction of this Court to review by writ of certiorari is conferred by 28 U.S.C. § 1257. Jurisdiction is sought to be invoked based on a right claimed under the United States Constitution – an alleged violation of the Due Process Clause of the Fourteenth Amendment:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

### STATEMENT OF THE CASE

This case clearly does **not** warrant review by this Court as shown by the opinion of the Alabama Supreme Court (App. 1a-20a); and by the exhaustive findings of fact and conclusions of law (App. 21a-92a) and final judgment of the trial court (App. 93a-106a), appended to the Petition.

The factual statement in the Petition is misleading, inaccurate, presents matters *dehors* the record,<sup>2</sup> treats Petitioners' unfounded suspicions as fact,<sup>3</sup> and varies substantially from the relevant facts of record as found by the courts below. Respondent adopts the findings below.

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<sup>2</sup> Editorial condemnation of the tort system in Alabama and especially of Class Counsel and the Circuit Court of Barbour County is not in the record and has no bearing on or similarity to this case, but is inserted to suggest some sort of impropriety or wrongdoing of which there is no evidence in this case. Appending the three editorials is both inappropriate and improper.

<sup>3</sup> Class Members, including Petitioners, were given ample time and opportunity to review all discovery and to respond to any evidence introduced by the class representative. The discovery issue was addressed and answered by the trial court and the Alabama Supreme Court: "In this case, the trial court, did in fact, *allow* limited discovery. . . . Also Class Counsel testified at the fairness hearing and was cross-examined at length by counsel for the objectors. . . ." (App. 19a) As testified, three individual lawsuits filed by Class Counsel were dismissed and those plaintiffs became class members. The net worth of Liberty National was established at \$327 Million by substantial evidence, subject to cross-examination and an opportunity for rebuttal. (App. 72a) Although Liberty National filed a policy form to be offered as a settlement, that settlement policy form was never accepted as a part of the settlement.

Petitioners representing approximately 1/10 of one percent of class members challenge a class action settlement of claims for injunctive and other equitable relief and for monetary damages against the insurer arising out of the alleged fraudulent exchange of cancer insurance policies with limited benefits for older cancer policies without such limitations. The settlement approved by the trial court, after hearing, as fair, adequate and reasonable, provided substantial injunctive and equitable relief enjoining the challenged exchange practices; reforming the replacement policies to eliminate the limitations; enjoining denying future claims under replacement policies based on limitations; reinstatement of certain lapsed cancer policies; optional replacement of old policies with reformed new policies; freezing premiums until one year from the date of a final order; and requiring common pooling for rate purposes for the common benefit of all class members; and restitution of 150% of the overall loss of benefits to cancer victims resulting from the exchange. In addition to this primary injunctive and equitable relief valued at more than \$40 Million,<sup>4</sup> the settlement also provided ancillary monetary relief for cancer victims totaling \$11 Million plus an additional \$4.5 Million as attorneys' fees plus expenses.

---

<sup>4</sup> This "value" is in addition to certain other important injunctive and equitable relief for which there was no measurable dollar value or monetary cost to Liberty National ascertainable, e.g., common pooling, injunction halting exchange practices, option to exchange old policies for new reformed policies, etc. As the Alabama Supreme Court noted "because equitable relief has a 'value' based on money or has 'worth' does not make it monetary relief." (App. 13a)



The relief sought and afforded by the Settlement was primarily injunctive and equitable, supplemented by monetary damages for the cancer victims. As found by the trial court:

The Court expressly finds that the primary relief provided for by the . . . Settlement, and the primary relief which would be justified by the alleged (but denied) conduct, is injunctive and further equitable relief in the nature of declaratory relief, reformation of certain insurance policies, and ancillary restitution. The provisions in the . . . Settlement for incidental monetary relief and supplemental extracontractual monetary relief are ancillary to the primary equitable and injunctive relief. (Pet. App. 97a)

Throughout the Petition, Petitioners erroneously imply (Pet. 2) and state (Pet. 21, 22)<sup>5</sup> that the class action is one "seeking predominately monetary relief" in an attempt to fall within the benefit of this Court's decision in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that due process requires that an absent plaintiff be provided with an opportunity to remove himself by opting out of the class. This Court in *Shutts* specifically held "our holding today is limited to those class actions which seek to bind known plaintiffs **concerning claims wholly or predominately for money judgments**. We intimate no view concerning other types of class actions such as those seeking equitable relief." *Id.* at 812, n. 3. [Emphasis added]

<sup>5</sup> E.g. "Although this action is clearly one predominantly seeking a money judgment, . . ." (Pet. 21); "an action which is predominantly for money damages. . . ." (Pet. 22).

From its inception, this class action complaint based on the fraudulent exchange of cancer policies sought declaratory, injunctive and other equitable relief and damages. (First Amendment to Complaint, C. 61-65). The Second Amendment to Complaint sought the equitable remedies of reformation and restitution. The class representative sought "injunctive and declaratory relief" reforming the new cancer policies to provide all the benefits of the "old policy" as well as additional benefits first included in the "new policy;" and requiring Liberty National "to pay all claims for covered expenses . . . ignoring any purported limits placed" on radiation, chemotherapy and prescription drugs by the "new policies." (C. 220-222)

#### REASONS FOR DENYING THE WRIT

Review on a writ of certiorari "is not a matter of right, but of judicial discretion," to be granted "only for compelling reasons." Supreme Court Rule 10. Petitioners have failed to present any "compelling reasons" for the grant of certiorari. This petition does not fall within the character of reasons enumerated in Rule 10: It does not present a conflict among the lower courts<sup>6</sup> or with a

<sup>6</sup> There is no conflict between this decision by the Alabama Supreme Court and decisions of the Eleventh Circuit. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983), cited by Petitioners as conflicting, is factually distinguishable from the instant case. *Holmes* was an abuse of discretion case based on "the facial unfairness of the distribution of the [monetary] award," where the 8 named plaintiffs sought 1/2 of the "finite and relevantly small lump sum [settlement] fund," leaving the remaining 1/2 to 118 other class members.

relevant decision of this Court, or involve an important question of federal law that has not been, but should be, settled by this Court; and contains no suggestion of departure "from the accepted and usual course of judicial proceedings."

1. The relief sought and accomplished by the settlement approved by the trial court was primarily injunctive and equitable relief, with incidental monetary damages, and did not "concern[ ] claims wholly or predominately for money judgments."<sup>7</sup>

The relief sought and granted was based on a corporate "boardroom fraud" to exchange cancer policies with certain unlimited benefits for cancer policies with limitations on those benefits. The primary thrust of this litigation was to halt that practice – past, present and future – and to restore the policyholder class members to the position of their bargain. The injunctive and equitable relief accomplish this purpose. With the exception of the limitation placed on radiation, chemotherapy and prescription drugs, the benefits under the new replacement policies exceeded those under the old policies, justifying a higher premium charge, which the policyholders had agreed and were willing to pay for better coverage. Reformation assures better coverage by retaining all the provisions of the new policies with broader benefits and by reinstating the unlimited radiation, chemotherapy and prescription drugs benefits of the old policy. The bargain

<sup>7</sup> This Court's holding in *Shutts*, is "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 812, n. 3.

has been restored by injunctive and equitable relief, including consideration for the higher premium through the form of enhanced coverage. The equitable remedy of restitution forced the defendant to disgorge benefits that would be unjust for it to keep, and at the same time reimburse all cancer victims (150%) for losses resulting from these limitations placed on the new policies. These same cancer victims were awarded incidental monetary relief for having been damaged by the rejection of their claims resulting from the limitations contained in the replacement policies.

The opinions of the Alabama courts clearly demonstrate the predominance of injunctive and other equitable relief. (Ala. Sup. Ct., App. 12a-13a; Trial Court, App. 39a-40a; 52a-56a), Final Judgment (App. 97a-101a).

As found by the trial court (App. 97a):

The Court expressly finds that the primary relief provided for by the . . . Settlement, and the primary relief which would be justified by the alleged (but denied) conduct, is injunctive and further equitable relief in the nature of declaratory relief, reformation of certain insurance policies, and ancillary restitution. The provisions in the . . . Settlement for incidental monetary relief and supplemental extracontractual monetary relief are ancillary to the primary equitable and injunctive relief.

The Alabama Supreme Court responded to Petitioners' claim that the relief was primarily for monetary damages (App. 12a-13a):

The relief awarded in the instant case included an order preventing Liberty National from



switching new policies for old policies without informing the insureds of the diminished benefits. Also, Liberty National was ordered to reform the "switched" new policies to include the benefits that had been provided in the old policies. Tellingly, the objectors point out in their brief that of the 400,000 class members, of whom 206,000 had policies fraudulently switched, less than 700 class members received actual money damages. "In other words, less than  $\frac{1}{4}$  of 1% of the class received money damages under the settlement." (Objectors' brief p. xxii.)

2. Petitioners submitted to the jurisdiction of the Alabama trial court by appearing and actually litigating the adequacy of representation by the class representative and class counsel and the merits and fairness of the settlement. See *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760, 771 (3rd Cir.), cert. denied sub nom. *Chicago Title Ins. Co. v. Tucson Unified School Dist.*, 493 U.S. 821 (1989) ("Of course, a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action. . . ."); and *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2nd Cir. 1992), cert. dismissed, 506 U.S. 1088 (1993). ("Shutts mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff. . . . Here, [plaintiffs] have already submitted to the court's jurisdiction. Because there is no question that the court has jurisdiction over [plaintiffs], Shutts is inapposite. . . .")

Here, the class members, including Petitioners and all non-resident or absent class members, were given written notice of the settlement, the opportunity to object, to participate and to be heard, in person or by counsel, and Petitioners, at the fairness hearing, participated and were heard either through counsel, in person, or both, and objected to and actually litigated the adequacy of representation by the class representative and class counsel and litigated the merits of the class certification and class action and fairness of the settlement.

Clearly, the non-resident Petitioners, by litigating these issues, have submitted to the jurisdiction of the Alabama trial court. Any defense of lack of jurisdiction over the person was waived by the non-resident Petitioners. See, *Martin v. Drummond*, 663 So.2d 937, 948 (Ala. 1995), cert. denied, \_\_\_ U.S. \_\_\_, 116 S.Ct. 1040, 134 L.Ed.2d 187 (1996).

In *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), this Court defined due process:

. . . The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Further,

. . . All that is necessary is that the procedures be tailored, in the light of the decision to be made, to "the capacities and circumstances of those who are to be heard," . . . to insure that

they are given a meaningful opportunity to present their case.

*Id.* at 349.

Moreover, this Court in *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702 (1982) clarified that personal jurisdiction was an individual right subject to being waived:

... The requirement that a court have personal jurisdiction flows ... from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty but as a matter of individual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit ... not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

Because the requirement of personal jurisdiction represents ... an individual right, it can, like other such rights, be waived. ...

Petitioners have not been denied or deprived of the due process guarantees of the U.S. Constitution.

### CONCLUSION

The decision of the Alabama Supreme Court in this case is well-reasoned and eminently correct. The underlying decision and final judgment of the trial court documented a thorough investigation into this class action, the

relief afforded the Class Members and, based on a thorough analysis utilizing the appropriate factors, reached a sound conclusion and order that the class action settlement, as modified by the trial court, was fair, reasonable and adequate; and provided primarily injunctive and other equitable relief.

Clearly, Petitioners' rights to due process were not violated by refusal to provide them with the right to opt out of this Rule 23(b)(2) and/or 23(b)(1) class, which class certifications were proper.

Accordingly, Petitioners have failed to advance any reason, and clearly no "compelling reason" for grant of certiorari, and, for the foregoing reasons, it is respectfully submitted that their petition should be denied.

Respectfully submitted,

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In The  
Supreme Court of the United States CLERK

October Term, 1996

GUY E. ADAMS, et al.,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

On Writ Of Certiorari To The  
Supreme Court Of Alabama

JOINT APPENDIX  
VOLUME I, PAGES 1-245

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Petition For Certiorari Filed May 16, 1996  
Certiorari Granted October 1, 1996

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**RELEVANT DOCKET ENTRIES  
CIVIL CASE ACTION SUMMARY**

State of Alabama  
Unified Judicial System

Case Number  
CV-92-021

IN THE CIRCUIT COURT  
OF BARBOUR COUNTY

Service Date 5-13-92

Plaintiff(s)	Defendant(s)
Charlie Frank Robertson	Liberty National Life Insurance Company
Case Number	Judge's Name
CV-92-021	Robertson
<u>X</u> Jury	Case Type
Date filed	Fraud
5-12-93	
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DATE	ACTIONS, JUDGMENTS, CASE NOTES
5-12-92	S&C filed.
5-13-92	LNLIC served by registered mail.
6-12-92	Motion to Dismiss and/or in the Alternative to Transfer filed.
6-19-92	Plaintiff's 2nd Request for Production to LNLIC.
7-7-92	Motions to Dismiss/Transfer set for September 14, 1992 9AM Clayton
8-12-92	Plaintiff's 3rd Request for Production to LNLIC.
8-18-92	LNLIC Response to Plaintiff's 2nd Request for Production.
8-18-92	LNLIC Response to Plaintiff's 1st set of Interrogatories and Request for Production.
8-24-92	Motion to compel answers to LNLIC/Motion to Compel response to Request for Prod.
8-27-92	All pending motions set for September 14, 1992.
9-14-92	Motion to compel by plaintiffs granted. Motion to transfer venue denied.
9-24-92	Order on Motion to Compel, Requests for Production #3 and #29, Interrogatory #25 and 3rd request for production. Other parts to Order about contacting policyholders etc.
9-30-92	Plaintiff's 4th request for production to LNLIC.
10-1-92	Hearing set for class certification and other pending motions for October 16th, 1992 at 10AM/Clayton.
10-2-92	Motion for Order Certifying Class Action and Brief in Support thereof.

10-2-92	Plaintiff's 1st amendment to complaint.
10-8-92	Plaintiff's 5th request for production to LNLIC.
10-14-92	Motion for more definite statement, Motion to Dismiss Plaintiff's 1st amendment to complaint and Motion to transfer by defendant. Defendant's response to motion for order certifying class action and request for additional time.
10-16-92	Brief in support of the October 14, 1992 motions by defendant.
10-16-92	Affidavits of Charlie Tobertson, Robert I. Stewart and John W. Miller.
10-16-92	To hear motions in Union Springs on October 29, 1992.
12-14-92	Order setting SC for January 4, 1993 at 9AM, Clayton.
1-4-93	Jury portion of trial continued until Fall Term, 1993.
1-13-93	Order setting non-jury issue for trial on March 8, 1993.
1-20-93	Motion to withdraw as counsel for Plaintiff filed by Whigham. Motion granted March 8, 1993.
1-29-93	Order setting hearing on certification for March 8, 1993.
2-5-93	LNLIC 1st request for production, requests for admissions, interrogatories, request for production and 1st interrogatories to Plaintiff.
2-22-93	Order on Motion to Compel etc.
3-4-93	Plaintiff's answers to defendant's request for admissions, interrogatories and request for production.

- 3-8-93 Class action settled. Attorneys to prepare order.
- 3-10-93 Order certifying class. Order dismissing Counts one and two of the Plaintiff's Complaint.
- 3-24-93 Plaintiff's 2nd interrogatories to LNLIC/ Motion to Compel response to Plaintiff's request for production.
- ?-?-93 Order setting all pending motions for May 5, 1993.
- 4-30-93 Motion for leave to intervene and Motion to amend order certifying class filed by W. Boyd Reeves, Norman E. Waldrop Jr. and M. Kathleen Miller.
- 5-5-93 All pending motions continued. Attorneys to contact Circuit Judge for date.
- 6-14-93 Motion for Leave to Intervene and Intervention Petition filed by William C. Roedder Jr. and W. Alexander Mosely.
- 6-16-93 Plaintiff's 2nd amendment to Complaint.
- 6-16-93 Stipulation and Agreement of Compromise and Settlement with exhibits A,B,B-1,C,D and E,
- 6-16-93 Order on Motion to Intervene. A hearing on Intervenor's petition is hereby set for July 27, 1993 at 9AM in Clayton.
- 6-16-93 Order with Respect to Proposed Settlement. A hearing to be held October 20, 1993 at 9AM at the courthouse in Clayton.
- 6-24-93 Joint Petition for Instructions to certain class members and to Liberty National concerning prosecution of separate action by certain class members. (By Plaintiff).

- 6-24-93 Order setting joint petition for instructions for June 28, 1993 (9AM), Clayton.
- 6-24-93 Deposition notice under rules 30(b)(6) and 30(b)(5)
- 6-24-93 Two (2) Intervenor's interrogatories and requests for production of documents to the Plaintiff. (One has 27 pages and one has 28 pages)
- 6-24-93 Motion if Intervenor's for leave to file in excess of 40 interrogatories under rule 33, ARCP. (Faxed to Court) Motion for Order Shortening Time for Response.
- 6-25-93 Order on Discovery by Intervenor's.
- 6-26-93 Motion for relief from and/or clarification of order with respect to proposed settlement by intervenors. Motion to amend intervention petition.
- 6-28-93 Liberty National's withdrawal and disavowal of all participation in joint petition for instructions as required by orders issued by The Circuit Court of Mobile County, Alabama on June 25, 1993.
- 7-2-93 Petition to Intervene (John D. Richardson & David F. Daniell, Attorneys) Motion to Strike and/or Motion to Dismiss or Withdraw Previous Orders.
- 7-6-93 Motion to Strike and/or Motion to Dismiss or withdraw previous orders denied.
- 7-6-93 Response of LNLIC to Petition for Intervention by Richard Hoss et al. LNLIC Opposition to Motion of Richard Hoss et al to Strike and/or Dismiss or Withdraw previous orders and for further relief.

- 7-6-93 Joint Motion of LNLIC, named Plaintiff and Class Counsel to Substitute Corrected Exhibits to Stipulation.
- 7-6-93 Order granting Joint Motion of LNLIC, Named Plaintiff and Class Counsel to substitute Corrected Exhibits to Stipulation.
- 7-6-93 Order on Intervention by Richard Hoss et al. Intervention granted.
- 7-6-93 Two (2) Briefs by Intervenor. Three (3) Indexes of Exhibits in Support Thereof.
- 7-7-93 Objection to Class Certification and Settlement Proposal, Motion for Leave to Intervene to File Individual Action or Opt Out of Class Action in Barbour County, and In the Alternative, Motion for Leave to Intervene as Class Representative. . . . Motion for Permission to Conduct Discovery. . . . Cmplaint [sic] In Intervention.
- 7-9-93 Order on Intervention.
- 7-13-93 LNLIC consolidated opposition to Intervenor's requests for leave to conduct discovery.
- 7-13-93 Plts. brief in opposition to Intervenor's request to conduct discovery.
- 7/16/93 Intervenor's Motion for Extension of Time to Comply with July 6, 1993 Order of the Court.
- 7/21/93 Brief in Support of Intervenor's Objections to Rule 23 (B)(2) Class Certification without a Right to Opt Out and the Proposed Settlement with 5 affidavits.
- 7/21/93 LNLIC Motion to Consolidate Hearings on All Motions and Requests for Relief by Intervenor with October 20, 1993 Fairness Hearing.
- 7/23/93 Intervenor's Motion for Extension of Time filed July 16, 1993 denied.

- 7/26/93 Motion to Join In Brief In Support of Intervenor's Request to Conduct Discovery.
- 7/26/93 Intervenor's Reply to Briefs in Opposition to Request for Leave to Conduct Discovery.
- 7/27/93 Intervenor's Brief in Support of Opting Out of the Rule 23 (b)(2) Class or in the Alternative, For Leave to Conduct Discovery.
- 7/27/93 In Clayton . . . Open Court. Some Discovery allowed. Fairness Hearing re-scheduled for November 4, 1993 at 9AM at Clayton.
- 8/2/93 Motion for Substitution of New Fairness Hearing Date in Documents to be mailed to Class Members, For Designation of Address for Special Master, For Correction of Typographical Error in June 16, 1993 Order with Respect to Proposed Settlement, and for Correction of Inadvertent Omission in Stipulation Prior to Mailing of Class Action Notice and Attachments. Court's Formal Order Entered.
- 8/3/93 Notice of Intent to Mail Class Action Notice and to Publish Summary Notice and Motion for Approval of Printed Notice, Summary Notice and Their Distribution and Publication. Court's Formal Order Entered.
- 8/4/93 Objection to Class Notice by Intervenor.
- 8/6/93 Motion to Dismiss by LNLIC & Motion to Dismiss by Torchmark Corp. These two (2) motions were filed under CV-92-021 but styled Willard P. Prince et al vs LNLIC et al.
- 8/9/93 Motion for Hearing on Propriety of Proposed Notice of Class Action and Objections to Notice filed by Intervenor.
- 8/13/93 Motion for Reconsideration of August 3, 1993 Order Approving Printed Notice, Summary



- Notice and Their Distribution and Publication filed by Intervenor.
- 8/16/93 Hon. Walter Calton appointed as Special Master.
- 8/17/93 Motion for Emergency Relief From Order by Havards. Affidavit of Dr. Michael W. Meshad.
- 8/18/93 Petition for Intervention Donald F. Allen et al.
- 8/19/93 Intervenor's request for oral argument on Motion for Reconsideration of August 3, 1993 Order Approving Printed Notice, Summary Notice and their distribution and publication.
- 8/20/93 Amended Motion for Reconsideration of August 3, 1993 Order Approving Printed Notice, Summary Notice and their Distribution and Publication.
- 8/20/93 Motion for Leave to Intervene by Joseph R. and Brenda L. Havard.
- 8/20/93 Stipulation.
- 8/20/93 Order Granting Complaint in Intervention.
- 8/20/93 Complaint in Intervention.
- 8/20/93 Motion to Appoint Process Server Filed & Granted.
- 8/20/93 Notice of Video Deposition of Brenda L. Havard.
- 8/20/93 Complaint in Intervention served on Craig J. Hurst, LNLIC and Torchmark.
- 8/24/93 Notice of Ethel M. Offord of Intention to appear & appearance.
- 8/27/93 Objection to Class Action by Donald W. Gabel (Attorney: J. Langford Floyd)

- 8/31/93 Motion for Exclusion from Class Action Pursuant to Alabama Rule of Civil Procedure 23 and/or Objection to Class Action Determination, Settlement and Settlement Hearing. Clarece Davis, Edith M. Boudan, Betty Napier Stacey, Sylvia L. Glisson, James B. Glisson, Terry A. Alday, Brenda York Cooper, Tony R. Davis, Helen B. Eslava, Robert L. Alday III, Edith F. Boudan, Steven D. Cooner and Billy H. Cooner. (Attorney) R. Jeffrey Perloff
- 9/01/93 Decent from Class Action Settlement by Velma Sanders Shuford and Robie S. White. (Attorney Bruce Boynton)
- 9/02/93 Objection to Class Action by Sandra G. Fuqua. (Attorney J. Langford Floyd)
- 9/02/93 Notice of Opting Out of Purported Class by James E. Haynes and Family and David R. Short and Family. (Attorney Garve W. Ivey Jr.)
- 9/02/93 Objections to Protective Order Proposed by LNLIC and Motion to Enter Alternative Confidentiality Order by Intervenor. (Attorney William C. Roedder)
- 9/07/93 Gary A. Brunson's Motion for Exclusion from Class Action Pursuant to Alabama Rule of Civil Procedure 23 and/or Objection to Class Action Determination, Settlement and Settlement Hearing. Same for Tony R. Davis. (Attorney is R. Jeffrey Perloff)
- 09/08/93 Intervenor's Motion to Continue November 4, 1993 Hearing.
- 09/09/93 Protective Order to Govern Disclosure.
- 9-15-93 Motion to Postpone The Deadlines Contained in the Court's Notice of Pendency of Action, Class Action Determination, Settlement, and Settlement Hearing; or in the Alternative, to

Alter Dates for the Proof of Distribution and Briefs and Other Documents to be Submitted in Support of the Settlement and Award of Attorney's Fees; or in the Alternative to Continue the November 4, 1993 Hearing. Filed by all Intervenor.

- 9-16-93 Motion to Set Pending Motions for Hearing by Several Intervenor.
- 9-16-93 Letter from William C. Roedder, Jr. to James A. Main dated September 13, 1993. Asked by Roedder to be filed as part of the record.
- 9/17/93 Notice That Certain Class Action Plaintiffs are not Included in the Class. (H. Darden Williams, Attorney)
- 9/20/93 Marie K. Peevy's Motion for Exclusion from Class Action Pursuant to Alabama Rule of Civil Procedure 23 and/or Objection to Class Action Determination, Settlement and Settlement Hearing. (R. Jeffrey Perloff)
- 9/20/93 Petition for Intervention by Ashton B. Cannon et al. (Richardson & Daniell)
- 9/23/93 Plaintiff's Request for Production to Defendant LNLIC (Several Authorization for Information)
- 9/27/93 Motion for Order Shortening Time for Responses to Request for Production by Intervenor.
- 9/27/93 Entry of Appearance and Objection to Proposed Settlement by many people. (Attorney: Stephen M. Gudac)
- 9/28/93 Five Separate Sets of Interrogatories to Intervenor by Plaintiff. Motion for Order Shortening Time Denied. Motion to continue 11/04/93 Hearing Denied.

- 9/30/93 Notice of Intent to Appear at Settlement Hearing, Objections of Rubye and Alfred Posey. (Attorney, Robert E. Richardson.)
- 10/05/93 LNLIC Objection to Intervenor's Motion to Shorten Time for Response to Request for Production Served by Intervenor in Violation of This Court's Previous Orders.
- 10/05/93 Notice of Intention to Appear and Objection to Inclusion as a Member of the Class filed pro-se by Talmadge M. Allen.
- 10/06/93 Reservation of Rights filed by Winona H. Turk Attorney is Melissa A. Posey.
- 10/06/93 Jackie C. Robertson declines to participate as a Class Member.
- 10/06/93 Geraldine Pinkston and Robert J. Gross decline to participate.
- 10/07/93 Notice of Appearance by Norman J. Gale Jr. for eight (8) clients. Objections.
- 10/08/93 Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement and Alternative Request to Opt Out by Hon. Lowry M. Lomax.
- 10/08/93 Brief in Support of Motion for Exclusion from Class Action Pursuant to Alabama Rule of Civil Procedure 23 and/or Objection to Class Action Determination, Settlement Hearing and Settlement. Notice of Intention to Appear and Petition [sic] to Intervene. (R. Jeffrey Perloff)
- 10/08/93 Petition to Intervene, Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement and Alternative Request to Opt Out of Class and Notice of Intention to Appear. (Attorney: Joseph J. Boswell and Sidney W. Jackson, III)



- 10/08/93 Objection to Class Certification, Class Notice, Denial of Discovery, issuance of Injunction and Class Settlement and Alternative Request to Opt Out of Class. (Attorney: John D. Richardson & David F. Daniell)
- 10/08/93 Petition to Intervene, Notice of Intention to Appear, and Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement and Alternative Request to Opt Out of Class (15). Attorney: William M. Lyon Jr.
- 10/08/93 Objection and Motion for Leave to Opt Out of Class Action and Motion for Leave to Intervene Under Rule 24(a). Attorneys: Grey Redditt Jr. and Lisa Bradford Hansen.
- 10/08/93 Notice of Intention to Appear, Objections and Filing of Documents and Papers. 3 large boxes and 1 smaller box of paperwork. Attorney: William Roedder Jr.
- 10/09/93 Notice of Intention to Appear, Objection to Mr. Robertson as a Representative of the Class as Defined, Claim for Relief by Attorney Slade Watson.
- 10/08/93 Statement of Intention to Appear at Settlement Hearing, Objection to Class certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement. And Alternative Request to Opt Out of Class. (18) Clients Attorney: Ronald O. Gaiser Jr.
- 10/08/93 Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement, and Alternative Request to Opt Out of Class. (6) Clients ATTORNEY: James Bodiford

- 10/08/93 Notice of Intention to Appear and Objection to Terms and Conditions of the Class Action Settlement: (55) Clients/Families Attorney: Gregory B. Breedlove
- 10/08/93 Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement and Alternative Request to Opt Out of Class. (6) Clients Attorney: James E. Atchison & Mona A. Vivar
- 10/08/93 Objection filed Pro-Se by Guy R. Jackson Sr. and Thelma S. Jackson
- 10/08/93 Notice of Intention to Specially Appear, Objection to Proposed Class Action and Motion to Opt Out of Class Action for several clients. Attorney: Robert A. Hannah (Florida)
- 10/08/93 William J. Pierce's Motion for Exclusion from Class Action Pursuant to Alabama Rule of Civil Procedure 23 and/or Objection to Class Action Determination, Settlement and Settlement Hearing. Attorney: R. Jeff Perloff
- 10/13/93 Petition to Intervene and Notice of Intention to Appear Attorney: Thomas J. Glidewell (4) Clients
- 10/12/93 Objection to Class Action Determination and Proposed Settlement. Attorney: J. Gusty Yearout
- 10/12/93 Objection to Class Action Determination and Proposed Settlement. Attorney: M. Clay Ragsdale
- 10/12/93 Motion to Opt Out or in the Alternative Objection to Class Certification and or The Proposed Settlement (2 Motions) Attorneys: Finnbohner & Chiepalich
- 10/12/93 Appearance by Additional Group A6 Class Members. Attorney: J. Cecil Gardner



- 10/12/93 (4) Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement, and Alternative Request to Opt Out of Class. Attorney: Thomas J. Glidewell
- 10/12/93 Notice of Intention to Appear, Petition to Intervene and Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement, and Alternative Request to Opt Out of Class. Attorney: Sidney W. Jackson III.
- 10/12/93 Request to be Excluded from Class of Plaintiffs and Objection to Terms of the Class Settlement. (2) Motion to Enforce Previous Order and Objection to Terms of Class Settlement. Attorney: Thomas P. Willingham
- 10/12/93 Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement and Alternative Request to Opt Out of Class. Attorneys: Lynn C. Miller & Mary Beth Mantiply
- 10/14/93 Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement and Alternative Request to Opt out of Class Attorney: Richard L. Thiry
- 10/14/93 Objection to be Included in Action filed Pro-Se by Norma S. Gordon and Kelly Gordon-Hooper.
- 10/14/93 Motion for More Definite Statement, Motion to Dismiss Plts 1st Amendment to Complaint and Motion to Transfer by LNLIC.
- 10/14/93 Copy of Letter dated September 3, 1993 from Attorney E. Dale Dewberry to Jere Beasley and James Gewin concerning Perry C. Buie.

- 10/18/93 Petition to Intervene. Attorney: John D. Richardson and David F. Daniell.
- 10/18/93 Order on Mandamus from Supreme Court concerning #1921852 and 1930001.
- 10/19/93 Answer of Respondent William H. Robertson, Circuit Judge of Barbour County on Order of Mandamus from Supreme Court.
- 10/20/93 Louie B. Spear and Joye Spear's Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement and Alternative Request to Opt Out of Class. Attorney: Richardson & Daniell.
- 10/25/93 Notice of Appearance by Stephen M. Gudac for more Plaintiffs.
- 10/25/93 Pro-se, Decline to Participate by Anna Allen.
- 10/25/93 Motion to Opt Out or in the Alternative, Objection to Class Certification and or The Proposed Settlement. (Attorney: Steve Olen)
- 10/27/93 Intervenors' Response to Class Counsel's Interrogatories and Requests for Production of Documents. (Attorney: Stephen R. Copeland)
- 10/27/93 Objections to Discovery (Attorney: Roedder)
- 10/27/93 Motion to Opt out or in the Alternative, Objection to Class Certification and or The Proposed Settlement. (Attorney: Finkbohner & Chiepalich)
- 10/28/93 Motion to Intervene (Attorney: Ronald O. Gaiser Jr.)
- 10/28/93 Response to Class Counsel's Interrogatories and Requests for Production. (Attorney: Stephen R. Windom)
- 10/28/93 Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and

Class Settlement and Alternative Request to Opt out of Class. (Attorney: William M. Lyon Jr.) (5)

- 10/28/93 Motion to Permit The Filing of Certain Objections (Attorney: Lyon)
- 10/28/93 Petition to Intervene (Attorney: Lyon)
- 10/29/93 Proof of Distribution of Printed Notice and Summary Judgment (Attorney: Gewin)
- 11/02/93 Order of Barbour Circuit Court. Case to be held November 18, 1993 at 8AM at the Courthouse in Eufaula.
- 11/01/93 Response of Intervenors to Class Counsels Interrogatories and Request for Production of Documents. (John D. Richardson.)
- 11/01/93 Motion to Opt Out or in the Alternative Objection to Class Certification and or the proposed settlement. (Steve Olen)
- 11/02/93 Motion to Postpone or Continue the deadline contained in the Court's Order with respect to proposed settlement establishing a deadline for Briefs or other documents in support of the settlement and [sic] in support of request for award of Attorney's fees and expenses. (James A. Main)
- 11/03/93 Supreme Court of Alabama (Ruling on Mandamus)
- 11/03/93 Motion to Opt out or in the alternative objection to class certification and or the proposed settlement. (Steve Olen)
- 11/04/93 Objection to Inclusion in Class. (Bob Sherling)
- 11/04/93 Opposition to Motion to postpone or continue the deadline contained in the courts order with respect to proposed settlement establishing a

deadline for briefs or other documents in support of the settlement and in support of request for award of Attorney's fees and expenses (Roedder)

- 11/04/93 Motion to opt out or in the alternative objection to class certification and/or the proposed settlement. (Steve Olen)
- 11/04/93 Appearance of Counsel for 3 people by Stuart Dubose.
- 11/05/93 Application to file notice of intention to appear and objection to the terms and conditions of the Class Action Settlement. (Irby)
- 11/08/93 Notice of Opt Out. (Daniell)
- 11/08/93 Petition to Intervene. Objection to class certification, class notice, denial of discovery, issuance of injunction and class settlement and alternative request to opt out of class. (Lyon)
- 11/09/93 Petition to Intervene. Objection to class certification, class notice, denial of discovery, issuance of injunction and class settlement and alternative request to opt out of class. (Lyon)
- 11/09/93 Motion to Reconsider Order setting Fairness Hearing and motion to continue. (Miller) (Wal-drop)
- 11/09/93 Filed 11/08/93. . . . Petition to Intervene/ Notice of Intention to Appear/ (2) Objections to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement and Alternative Request to Opt Out of Class. (Glidewell)
- 11/09/93 Filed 11/08/93. . . . Motion to Opt Out or in The Alternative, Objection to Class Certification and/or The Proposed Settlement. (Olen)



- 11/09/93 Motion to Opt Out or in the alternative objection to Class Certification and/or The Proposed Settlement. (Finkbohner & Chiepalich)
- 11/09/93 Motion to Opt Out or in the alternative, objection to class certification and or the Proposed Settlement. (Olen)
- 11/10/93 Motion for leave to file objection to class certification, class notice, denial of discovery, issuance of injunction and class settlement and alternative request to opt out of class. (Waldrop & Miller)
- 11/10/93 Objection to class certification, class notice, denial of discovery, issuance of injunction and class settlement and alternative request to opt out of class. (Waldrop & Miller)
- 11/12/93 Order from Circuit Court. Continued until January 20, 1994 at 8AM at Eufaula.
- 11/15/93 Motion to opt out or in the alternative objection to class certification and/or The Proposed Settlement. (Olen)
- 11/15/93 Application to file notice of intention to appear and objection to the terms and [sic] conditions of the Class Action Settlement. (Irby)
- 11/16/93 Motion to opt out or in the alternative objection to class certification and or the Proposed Settlement (Finkbohner)
- 11/16/93 Motion for Order confirming that certain claims are not within the class action certified in Barbour County, are not subject to this Court's injunction, and are reserved for separate proceedings. (Roedder)
- 11/16/93 Motion for Order confirming that certain [sic] claims are not within the class action [sic] certified in Barbour County and are not subject to this Court's injunction. (Waldrop & Miller)

- 11/18/93 Objection by Additional Group A-6 Class Members (Gardner)
- 11/22/93 Motion to opt out or in the alternative, objection to class certification and or the proposed settlement. (Olen)
- 11/23/93 Statement of intention to appear at settlement hearing, objection to class certification, class notice, denial of discovery, issuance of injunction and class settlement and alternative request to opt out of class (Gaiser)
- 11/30/93 Motion to opt out or in the alternative, objection to class certification and or the proposed settlement. (Olen)
- 11/30/93 Objection to class certification, class notice, denial of discovery, issuance of injunction and class settlement and alternative request to opt out of class. (Lomax)
- 12/03/93 Motion to opt out or in the alternative, objection to class certification and or the proposed settlement. (Olen)
- 12/03/93 Motion to Opt Out. (Knight)
- 12/06/93 Motion in Intervention and Objection to Class notice, class certification, Issuance of injunction and class settlement and alternative request to opt out of class. (Howard)
- 12-8-93 Motion to Opt out or in the alternative, objection to class certification and or the proposed settlement. (Olen)
- 12-9-93 Notice of intention to appear and objection to proposed settlement agreement and inclusion within this class. (Rainey)
- 12-9-93 Motion to be excluded from class of Plaintiffs and objection to terms of the class settlement. (Alexander)



- 12-9-93 Notice of Appearance as Counsel of Record. (Alexander & Baker)
- 12-10-93 Notice of Appearance (Gudac)
- 12-10-93 Request pro-se to be included by William & Gloria Cazalas.
- 12-13-93 Brief in Respect of Constitutionality of Proposed Settlement. (Roedder)
- 12-13-93 Response to the Courts request for advice relative to class members who will be bound by the proposed settlement without receiving any benefit. (Walker)
- 12-14-93 Response to the Court's Order dated 11/12/93. (Gudac)
- 12-15-93 Brief in support of objection and motion for leave to opt out of class action (Redditt)
- 12-15-93 Brief in support of intervenor's objections to rule 23(b)(2) class certification without a right to opt out and the proposed settlement. (Redditt)
- 12-15-93 LNLIC response and opposition to pleading filed by Gussie and Willa Johnson and James R. and Linda L. Swilley entitled "Motion for Order confirming that certain claims are not within the class action certified in Barbour County and are not subject to this Court's Injunction. (Gewin)
- 12-15-93 Brief of Harvey M. Young Jr. (Watson)
- 12-15-93 Brief of Rubye and Alfred Posey (Richardson)
- 12-15-93 Notice of Intention to Specially Appear, objection to proposed class action and motion to opt out of class action. (Hannah)
- 12-15-93 Brief in Compliance with Court Order of 11/12/93. (Hannah)

- 12-15-93 Brief in Opposition to Certification Under Rule 23(b)(2). (Gale)
- 12-15-93 Brief (Atchison)
- 12-15-93 Response to the Court's Order of 11/12/93. (Reeves)
- 12-15-93 Brief in Support of Rule 23(b)(2). (Main)
- 12-15-93 Brief in Opposition to Class Certification. (Yearout)
- 12-15-93 Brief of Robie S. White. (Boynton)
- 12-16-93 Motion to opt out or in the alternative, objection to class certification and or the proposed settlement. (Olen)
- 12-17-93 Box from Bradley, Arant, Rose & White.
- 12-17-93 Motion to opt out or in the alternative etc. (Finkbohner) Two (2)
- 12-17-93 Request to be excluded from class of Plaintiffs and objection to terms of the Class Settlement. (Willingham) Six (6)
- 12-17-93 Response and Amended Response to the Court's Order dated 11/12/93. (Gudac)
- 12-17-93 Objector's Response to Court Order dated 11/12/93. (Finkbohner)
- 12-20-93 Seven (7) Objections. (Jones & Short)
- 12-20-93 Amendment to motion to opt out or in the alternative objection etc. (Finkbohner)
- 12-20-93 Motion for extension of time for filing objection and claim form. (Short)
- 12-20-93 Motion in opposition to class action etc. (Jones)
- 12-20-93 Response to Court's Order of 11/12/93. (Glidewell)

- 12-20-93 Objection by additional Group A-6 Class Members. (Gardner)
- 12-21-93 Supreme Court Ruling on Writ of Mandamus & Motion to Stay
- 12-21-93 Motion to opt out etc. (Olen)
- 12-21-93 Notice of appearance by Stewart & Williams
- 12-21-93 Motion for leave to file objection to class certification etc. (Waldrop)
- 12-21-93 Two (2) Request to be excluded from class of plaintiffs and objection to terms. (Willingham)
- 12-21-93 Objection to class certification etc. (Waldrop)
- 12-22-93 Objection to class certification etc. (Gottlieb)
- 12-27-93 Motion for Filing late objection. (Jones & Short)
- 12-28-93 Court Order advising Attorneys of Pre-Trial Conference on January 19, 1994.
- 12-29-93 Letter to Judge Robertson from Helmsing, Lyons, Sims and Leach concerning brief filed on behalf of Objectors.
- 1-3-94 Appearance for Member of Class. (Williams)
- 1-3-94 Objection to Class Certification etc. (Foster)
- 1-3-94 Motion for leave to file objection to class certification etc. (Foster)
- 1-3-94 Objection to class certification etc. (Sanchez)
- 1-3-94 Petition to Intervene. (Sanchez)
- 1-3-94 Notice of Intention to Appear. (Sanchez)
- 1-4-94 Objection to class certification etc. (Baxley)
- 1-6-94 Motion to opt out etc. (Olen)
- 1-10-94 Motion for Relief from Protective Order. (Gaiser)

- 1-11-94 Kevin Morrow's Objection to Class Certification etc. (Richardson)
- 1-12-94 Two (2) Orders from Supreme Court concerning Mandamus.
- 1-12-94 Motion to Quash Subpoenas. (Gewin)
- 1-17-94 Two (2) Boxes from Bradley, Arant, Rose & White.
- 1-17-94 Briefs, Letters etc concerning Attorney's fees.
- 1-18-94 Two (2) Motion to opt out etc. (Olen)
- 1-18-94 Amended Objection to class certification etc. (Waldrop)
- 1-18-94 Motion to Quash Subpoenas. (Wilson)
- 1-18-94 Deborah R. McDonald's objection to class certification etc. (Richardson)
- 1-19-94 Motion to Quash or Modify Subpoena filed by Walter Calton.
- 1-19-94 Motion to Quash Subpoena filed by Calton stayed until hearing can be held.
- 1-19-94 Two (2) Motion to opt out etc. (Olen)
- 1-19-94 Motion to Quash Subpoena (Gewin & Williams)
- 1-19-94 Objection to Class Certification etc. (Thiry)
- 1-19-94 Affidavit of Thurman F. Clayton
- 1-20-94 Objections to Class Certification and Proposed Settlement (Hutchinson)
- 1-20-94 Affidavit of Oscar H. Goree Jr.
- 1-20-94 Amended Notice of Intention to Appear, Petition to Intervene and Objection to Class Certification, Class Notice, Denial of Discovery,

- Issuance of Injunction and Class Settlement, and Alternative Request to Opt Out of Class (Sanchez)
- 1-20-94 Baldwin County Probate Letter Testamentary (Soesbe)
- 1-20-94 Non-Waiver of Objections
- 1-25-94 Objection by Additional Group A-6 Class Members (Gardner)
- 1-25-94 Motion for Order Confirming that Certain Claims are not within the Class Action Certified in Barbour County, are not subject to this Court's Injunction and are Reserved for Separate Proceedings (Windham)
- 1-26-94 Supplemental Affidavit of John S. Moyse
- 1-26-94 Affidavit of Betty Ann Eckles
- 1-26-94 Submission of SEVEN (7) Affidavits in Opposition to Defendant's Motion to Strike Late Objection
- 1-26-94 Motion of LNLIC with Class Counsel's Consent for an Order Certifying this Action as a Class Action for Settlement Purposes Pursuant to Alabama Rules of Civil Procedure 23 (b) (1) (A), 23(b) (B) and 23 (b)(2)
- 1-26-94 Notice of Filing Rebuttal Affidavit of Anthony L. McWhorter
- 1-26-94 LNLIC Statement Regarding Objections to Documentary Material Proffered or Submitted by the Objectors and Intervenor.
- 1-26-94 Letter Type Brief to Judge Robertson from Miller
- 1-26-94 Letter to Judge Robertson from Miller
- 1-26-94 Rebuttal Affidavit of Anthony L. McWhorter

- 1-27-94 Affidavit of Annie Wilson
- 1-28-94 Objection to and Motion to Strike the Supplemental Affidavit of Moyse
- 1-31-94 Motion for Order Allowing Claimant to Submit Proof of Claim Forms and Receive Benefits Under the Proposed Class Action Settlement (Roedder)
- 2-1-94 Objection to and Motion to Strike the Rebuttal Affidavit of Anthony McWhorter
- 2-1-94 Notice of Filing of Transcript of Rebuttal Closing Argument [sic] by Norman Waldrop in CV-92-4085 (McAllister bs LNLIC, Mobile County) (Gwin)
- 2-1-94 Motion for Order Allowing Claimant to Submit Proof of Claim Forms and Receive Benefits under the Proposed Class Action Settlement (Roedder)
- 2-4-94 Order and Judgment Conditionally Approving Class Action Settlement
- 2-7-94 Notice of Filing Affidavits (Roedder)
- 2-15-94 Motion to Modify Court Order (Beasley)
- 2-16-94 Order Extending Time for Objections
- 2-22-94 Opposition to Class Counsel's Motion to Modify Court Order, Which Class Counsel Filed on or about February 15, 1994 (Gwin)
- 2-22-94 Discovery Order
- 2-22-94 Copy of Request for Dismissal & Inclusion in Class Action CV-93-024 Barbour County (Gould vs LNLIC)
- 2-24-94 Objector's Motion to Modify Court Order (Roedder)



- 2-28-94 LNLIC Opposition to Motions and Requests by Objectors, Intervenor and other Class Members for Variance or Modification of Settlement Terms & Procedures
- 2-28-94 Consolidated Discovery Interrogatories & Request for Production by Plt, PLts 1st set of Interrogatories and Request for Production to Torchmark Corp. Directions for Answering Interrogatories and Producing Materials & Things.
- 2-28-94 Same as above to Liberty National Life Insurance Company
- 2-28-94 Objectors' Motion to Modify Court Order (Finkbohner)
- 3-1-94 Objection to Class Certification, Class Notice, Denial of Discovery, Issuance of Injunction and Class Settlement, and Alternative Request to Opt Out of Class (Watters)
- 3-1-94 Motion to Modify Discovery Order entered 2/22/94 (Miller)
- 3-1-94 Response to LNLIC Opposition to Class Counsel's Motion to Modify Court Order (Miller)
- 3-1-94 Affidavit of Donald E. Smith / Affidavit of Leo L. Crain
- 3-1-94 Motion to Order LNLIC to Disclose Rejected Claims (Richardson)
- 3-2-94 Motion of Certain Objectors to Clarify, or in the Alternative, Modify Discovery Order dated 2/22/94 (Roedder)
- 3-2-94 Letter from Judge Robertson to Larry U. Sims and William C. Roedder Jr (3-2-94)
- 3-2-94 Objectors' Motion to Modify Court Order (Richardson)

- 3-2-94 Letter to Judge Robertson from Larry U. Sims dated 3-1-94
- 3-4-94 Torchmark Corp objections to Plts 1st set of interrogatories and request for production (Elliott)
- 3-4-94 Objectors' Motion to Modify Court Order (Gale)
- 3-4-94 Notice of Appearance by Hon. Wendy A. Pierce
- 3-7-94 Objector Harvey Young Jr.'s response to Court Order of 2/4/94 on his own behalf and on behalf of the Sub-Class sought to be represented. (Watson)
- 3-8-94 Motion to compel Torchmark to respond to Plts 1st set of Interrogatories and request for production (Wilson)
- 3-8-94 Motion of certain objectors to modify discovery order dated 2/22/94 (Olen)
- 3-9-94 Objectors' Motion to Modify Court Order (Olen)
- 3-14-94 Objectors' Motion to Modify Court Order (Boynton)
- 3-18-94 Notice of Taking Depositions (3)
- 3-21-94 Motion to Require Escrow of Additional Funds (Beasley)
- 3-25-94 Motion for order that documents produced by Torchmark Corp shall be subject to the protective order heretofore entered by the Court and executed between and among Class Counsel, Defendant LNLIC and Counsel for various objectors (Elliott)
- 3-25-94 Order concerning Protective Order
- 3-25-94 Objections to Motion by Torchmark for Protective Order (Roedder)

- 3-28-94 Order Requiring Additional Escrowing of Funds
- 3-31-94 Letter from Richard L. Thiry to Judge Robertson dated 3/31/94
- 4-14-94 Motion to Strike the Affidavit of Harvey Young (Gewin)
- 5-6-94 Order setting all outstanding motions for hearing on May 19, 1994
- 5-13-94 Request for Court Consideration of Pending Motions (Roedder)
- 5-13-94 Motion for Further Discovery (Roedder)
- 5-13-94 Notice of Filing of Transcripts of Depositions etc by LNLIC V-19
- 5-13-94 LNLIC opposition to motions of Class Counsel and of various objectors to modify or delete Torchmark from the release
- 5-13-94 Motion of objectors for award of Attorneys' fees and costs (Miller) Affidavit of M. Kathleen Miller
- 5-13-94 Brief in support of the Motions of Objectors and Class Counsel to modify Court Order to delete Torchmark from the release with 6 exhibits V-20
- 5-18-94 Notice of Filing by Doson (John Samford Depo and exhibits to 6 depositions V-21)
- 5-18-94 LNLIC reply to objectors' brief regarding motion to delete Torchmark from the release.
- 5-18-94 LNLIC opposition to motion for further discovery
- 5-18-94 LNLIC opposition to motion of objectors for award of attorneys' fees and costs

- 5-18-94 Motion to Adopt Prior Motions Filed by Objectors (Glidewell)
- 5-18-94 Withdrawal of Objections of Raymond & Vice Ellsworth (Gardner)
- 5-18-94 Motion for Leave to Withdraw as Counsel for objector, Catherine M. Parker (Gardner)
- 5-19-94 Notice of Filing Rebuttal Affidavits of Thomas Hamby, Hubert Morrison and Ray Lenderman (Gewin & Pennington)
- 5-23-94 Motion to Adopt Prior Motions Filed by Objectors (Lyon)
- 5-25-94 Adoption and Reassertion of Previously Filed Objections and Motions
- 5-26-94 Amended Motion of Counsel for Objectors Guy E. Adams, et al and award for Attorney Fees. (Waldrop)
- 5-26-94 Amended Affidavit of M. Kathleen Miller
- 5-26-94 LNLIC Notice that if the Court's February 4, 1994 Modifications are the final Modifications to the Settlement, they are accepted by LNLIC
- 5-26-94 Findings of Fact and Conclusions of Law
- 5-26-94 Order & Final Judgment
- 5-27-94 Acceptance of Modification to Settlement Agreement (Wilson)
- 6-20-94 Motion to Withdraw as Counsel for William T. Beasley (Richardson)
- 6-20-94 Motion to Alter, Amend or Vacate a Judgment. (Howell)
- 7/5/94 Five (5) Notice of Appeals etc to the Supreme Court

7/6/94 Two (2) Notice of Appeals etc to the Supreme Court

7/7/94 Nine (9) Notice of Appeals etc to the Supreme Court

8/16/94 Sixteen (16) Letters of Transmittal of Notice of Appeal etc by Trial Clerk to Appellate Clerk

8/16/94 Motion for Substitution by Rhonda Udrescu on behalf of Brenda L. Havard (2)

8/30/94 Certificate of Completion of Clerk's Record on Appeal

8/30/94 Certificate of Completion of Record on Appeal

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IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON,\*  
for himself, and in his \*  
representative capacity for the \*  
class of persons described \*  
herein, \*

Plaintiff, \*

vs. \*

LIBERTY NATIONAL LIFE \*  
INSURANCE COMPANY, \*

Defendant. \*

\* Case Number:  
\* CV-92-021

COMPLAINT

(Filed May 12, 1992)

1. Plaintiff is over the age of 19 years and resides in Barbour County, Alabama.

2. Defendant is a domestic corporation with its principal place of business located in Birmingham, Jefferson County, Alabama. Said Defendant does business by agent in Barbour County, Alabama.

3. Plaintiff brings this action on behalf of himself and all members of a class composed of persons who have had unauthorized loans placed against their policies of insurance by Defendant. Plaintiff alleges that the class is so numerous that joinder of all members is impracticable and that the total membership of the class may be well in excess of 100 persons. There are questions of law or fact common to the class, such as the fraudulent acts of



Defendant relating to its policyholders that are substantially similar in nature as well as the laws applicable thereto. Plaintiff's claims as a representative of the case are typical of the claims of the class. In his representative capacity, Plaintiff will fairly and adequately protect the interests of the class.

4. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. The following paragraphs of the complaint will more particularly describe the aforementioned risk of incompatible standards of conduct.

#### COUNT ONE

5. Plaintiff realleges paragraphs 1 through 4 of the complaint as if set out here in full.

6. Defendant issued a policy of life insurance to Plaintiff being number LNA001040687.

7. Defendant, without authority, took out a loan in the name of the Plaintiff against the above referenced policy of insurance.

8. Defendant knew, or reasonably should have known, that Plaintiff did not take out a loan against his policy, nor authorize anyone else to do so.

9. Plaintiff received no proceeds from the loan at any time.

10. The loan accrued interest and was against Plaintiff's policy.

11. The acts by Defendant were intentional, malicious, wanton, or done so recklessly as to amount to an intentional act.

12. As a proximate consequence of the Defendant's wrongful acts, Plaintiff was injured and damaged as follows: he suffered mental pain and anguish; he incurred interest on the loan; his credit was affected; and he was otherwise injured and damaged.

WHEREFORE, Plaintiff demands judgment against Defendant in such amount of compensatory damages as a jury may award under the facts and circumstances of this case; Plaintiff demands a separate amount as punitive damages; and his costs.

#### COUNT TWO

13. Plaintiff realleges paragraphs 1 through 12 of the complaint as if set out here in full.

14. Plaintiff is informed and believes, and upon such information and belief, alleges that numerous other policy holders had unauthorized loans taken out against their policies; that Defendant knew, or reasonably should have known, that the unauthorized loans were being made and charged against the policies; and that Defendant condoned the activity of its employees or agents in the fraudulent scheme.

WHEREFORE, Plaintiff, on behalf of himself, and all members of the above referenced class, demands judgment against Defendant as follows:

- a. An adjudication by the Court relating to the unauthorized loans;
- b. Entry of judgment against Defendant for the full amount of the injuries and damages suffered by the members of the class;
- c. Injunctive relief as deemed necessary by the Court;
- d. Such other relief to which Plaintiff and the members of the class may be entitled;
- e. A reasonable attorney's fee for Plaintiffs attorneys; and
- f. His costs of this action.

/s/ Jere L. Beasley  
JERE L. BEASLEY,

/s/ Thomas J. Methvin  
THOMAS J. METHVIN, Attorneys  
for Plaintiff

OF COUNSEL:

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**JURY DEMAND**

PLAINTIFF HEREBY DEMANDS TRIAL BY JURY  
ON ALL ISSUES OF THIS CAUSE.

/s/ Jere L. Beasley  
OF COUNSEL

---

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, \*  
for himself, and in his \*  
representative capacity for the \*  
class of persons described herein,\*

Plaintiff, \*

vs. \*

LIBERTY NATIONAL LIFE \*  
INSURANCE COMPANY, \*

Defendant. \*

Case Number:  
CV-92-021

PLAINTIFF'S FIRST AMENDMENT TO COMPLAINT

(Filed October 2, 1992)

COUNT III

15. Plaintiff realleges paragraphs 1 - 14 of the original complaint as if set out here in full.

16. Plaintiff brings this action on behalf of himself and all members of a class composed of persons, who had cancer insurance policies with Liberty National Life Insurance Company prior to 1986, and whose policies were then switched, or there was an attempt to switch, to a new cancer insurance policy with Liberty National during or after 1986. Plaintiff alleges that the class is so numerous that joinder of all members is impractical and that the total membership may well be in excess of 1,000 people. There are questions of law or fact common to the class, such as the fraudulent acts of Defendant relating to its policyholders that are substantially similar in nature,

as well as the laws of applicable thereto. Plaintiff's claim as a representative of the case is typical of the claims of the class. In his representative capacity, Plaintiff will fairly and adequately protect the interest of the class.

17. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. The following paragraphs of the complaint will more particularly describe the aforementioned risk of incompatible standards of conduct.

18. Defendant Liberty National Life Insurance Company issued a policy of cancer insurance to Plaintiff (No. 27542676) on January 1, 1987.

19. On the face of the application, it shows that this cancer insurance policy was replacing an older cancer insurance policy (No. 24373745) with Liberty National.

20. The new replacement policy was of substantially less value to Plaintiff than the old policy of cancer insurance.

21. The benefits were much less under the new policy.

22. Defendant fraudulently stated to Plaintiff that the new policy was much better than the old policy and that it would be in Plaintiff's best interest to take out the new policy.

23. The representations by Defendant were false and Defendant knew they were false.



24. The acts by Defendant were intentional, malicious, wanton or done so recklessly as to amount to intentional act.

25. As a proximate consequence of Defendant's wrongful acts, Plaintiff was injured and damaged as follows: he suffered mental pain and anguish; he has a policy of less value, with less benefits; he lost benefits under the old policy; and he was otherwise injured and damaged.

WHEREFORE, Plaintiff demands judgment against Defendant in such an amount of compensatory and punitive damages as a jury may award under the facts and circumstances of this case, plus his costs.

#### COUNT IV

26. Plaintiff realleges paragraphs 1 - 14 of the original complaint and paragraphs 15 - 25 of this amended complaint as if set out here in full.

27. Plaintiff is informed and believes and, upon such information and belief, alleges that numerous other policyholders of Defendant had their cancer policy switched in 1986 or later.

28. Defendant knew that this was happening and encouraged its agents to make the switch by giving them a higher than normal commission for selling a new cancer policy and canceling an old cancer policy.

29. A pattern and practice of this type behavior and activity occurred throughout the state and involved numbers of agents and policyholders.

30. Defendant condoned and fostered the activities of its employees or agents in this fraudulent scheme.

31. Defendant profited as a result of the wrongful acts.

WHEREFORE, Plaintiff, on behalf of himself and all members of the above referenced class, demands judgment against Defendant as follows:

- a. an adjudication by the Court relating to the cancer policies being switched;
- b. entry of judgment against Defendant for the full amount of injuries and damages suffered by the members of the class;
- c. injunctive relief as deemed necessary by the Court;
- d. such other relief to which Plaintiff and members of the class may be entitled;
- e. a reasonable attorney's fee for Plaintiff's attorneys; and
- f. his costs of the actions.

/s/ Jere L. Beasley  
JERE L. BEASLEY,

/s/ Thomas J. Methvin  
THOMAS J. METHVIN,  
Attorneys for Plaintiff

## OF COUNSEL:

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JURY DEMAND

PLAINTIFF HEREBY DEMANDS TRIAL BY JURY  
ON ALL ISSUES OF THIS CAUSE.

/s/ Jere L. Beasley  
OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all counsel of record *as listed below* by placing a copy of same in the United States Mail, first class, postage prepaid on this the 1st day of October, 1992.

/s/ Jere L. Beasley  
OF COUNSEL

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P.O. Box 896  
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Mr. Boyd Whigham  
Post Office Box 475  
Clayton, Alabama 36016

---

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, \*  
for himself, and in his \*  
representative capacity for the \*  
class of persons described herein,\*  
Plaintiff, \*

Case Number:  
CV-92-021

vs. \*

LIBERTY NATIONAL LIFE \*  
INSURANCE COMPANY, \*  
Defendant. \*

MOTION FOR ORDER CERTIFYING CLASS ACTION

(Filed October 2, 1992)

Plaintiff moves the Court pursuant to Rule 23, Alabama Rules of Civil Procedure, for an order certifying this cause as a class action and designating Plaintiff as class representative.

Plaintiff brings this action on behalf of himself and other similarly-situated owners of Liberty National cancer policies purchased prior to 1986 whose cancer policies were switched, or an attempt to switch was made, to new cancer policies during or after 1986 under the pretext that the new cancer policies provided better coverage. The action is brought for damages for Defendant's scheme to trick owners of cancer policies that provided comprehensive coverage for radiation and chemotherapy treatment, drugs, and other benefits into switching to an "updated" cancer policy that provided substantially less radiation and chemotherapy coverage, drugs coverage, and other benefits.

Plaintiff submits that this action should be certified as a class action under Alabama Rules of Civil Procedure 23 (a) and 23 (b) (2) and 23 (b) (3). Plaintiff submits that although 23 (b) (2) and 23 (b) (3) are the preferable classes of certification in this matter, class certification under 23 (b) (1) is proper and in the alternative, Plaintiff seeks class certification pursuant to 23 (a) and 23 (b) (1).

Plaintiff is able to meet the evidentiary requirements for class certification under A.R.Civ.P. 23 (a) and 23 (b) (1), (b) (2), and (b) (3).

/s/ Jere L. Beasley  
JERE L. BEASLEY,

/s/ Thomas J. Methvin  
THOMAS J. METHVIN,  
Attorneys for Plaintiff

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing document upon all counsel of record *as listed below* by placing a copy of same in the United States Mail, first class, postage prepaid on this the 1 day of October, 1992.

/s/ Thomas J. Methvin  
OF COUNSEL

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---

**IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division**

LOUISE PEEL,  
Plaintiff,

vs.

LIBERTY NATIONAL LIFE  
INSURANCE COMPANY,  
Defendant.

\*  
\*  
\*  
\*  
\*  
\*  
\*

**COMPLAINT**

(Filed October 6, 1992)

**STATEMENT OF THE PARTIES**

1. Plaintiff Louise Peel is over the age of nineteen (19) years and resides in the Clayton Division of Barbour County, Alabama.

2. Defendant Liberty National Life Insurance Company (hereinafter "Liberty National") is a domestic corporation with its principle place of business in Birmingham, Alabama and does business by agent in Barbour County, Alabama.

**STATEMENT OF THE FACTS**

3. Prior to 1987, Plaintiff took out a cancer insurance policy on herself and her husband with Defendant.

4. At all times material hereto, Plaintiff paid premiums on the policy to Defendant.

5. In 1987 or 1988 Defendant canceled the cancer insurance policy and sold Plaintiff and her husband a new policy with less benefits.

6. Defendant represented to Plaintiff that the new policy was a better policy with increased benefits.

7. The representations by Defendant were false and Defendant knew they were false.

8. Plaintiff relied upon the false representations and purchased the new policy.

9. On December 29, 1990, Plaintiff's husband, Kenneth Peel was diagnosed with cancer.

10. In 1991, Kenneth Peel filed a claim on his cancer insurance policy.

11. Liberty National paid benefits based on the new cancer policy taken out in 1987 or 1988.

12. The benefits paid were substantially less than would have been paid under the older cancer policy which had been canceled.

13. In 1991, Plaintiff canceled her cancer insurance policy because her husband's policy had not paid full benefits.

14. In March 1991, Kenneth Peel died.

15. Plaintiff is now responsible for her husband's unpaid medical bills.

16. Plaintiff did not know, and reasonably should not have known, that any fraud had been perpetrated upon her until 1991 when the medical bills were not paid in full.

17. At all times material hereto, Plaintiff made payments on the new policy and such policy was in full force and effect.

### COUNT ONE

18. Plaintiff realleges paragraphs 1 through 17 of the complaint as if set out here in full.

19. In 1987 or 1988, Defendant devised and entered into a scheme to defraud Plaintiff and others by canceling her and her husband's cancer policy and selling them a new policy which provided less benefits.

20. Defendant's conduct under the circumstances amounted to actual malice.

21. Defendant's conduct was part of a pattern or practice of fraud or other intentional wrongful conduct.

22. As a proximate consequence, Plaintiff was injured and damaged as follows: she lost the benefit of her policy and her husband's policy; she was forced to pay the difference for her husband's medical bills; she suffered mental anguish and will continue to do so; and she was otherwise injured and damaged.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount a jury may award for compensatory and punitive damages plus interest and costs.

### COUNT TWO

23. Plaintiff realleges paragraphs 1 through 17 of the complaint as if set out here in full.

24. Defendant fraudulently failed to disclose to Plaintiff that the new cancer insurance policy was of less value than the old ones.

25. Plaintiff altered her position by accepting the new policy.

26. Defendants' conduct was part of a pattern or practice of fraud or other intentional wrongful conduct.

27. Defendants' conduct under the circumstances amounted to actual malice.

28. As a result of Defendant's fraudulent suppression, Plaintiff was injured and damaged as alleged in paragraph 22.

WHEREFORE, Plaintiff demands judgment against Defendants in an amount a jury deems reasonable for compensatory and punitive damages plus interest and costs.

/s/ Jere L. Beasley  
JERE L. BEASLEY,

/s/ Thomas J. Methvin  
THOMAS J. METHVIN,  
Attorneys for Plaintiff

OF COUNSEL:

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JURY DEMAND

PLAINTIFF HEREBY DEMANDS TRIAL BY JURY  
ON ALL ISSUES OF THIS CAUSE.

/s/ Jere L. Beasley  
OF COUNSEL

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IN THE CIRCUIT COURT WITHIN AND FOR  
THE COUNTY OF BARBOUR  
STATE OF ALABAMA

CHARLIE FRANK ROBERTSON,	]	
PLAINTIFF,	]	
- VS -	]	CIVIL ACTION
	]	<u>NO. CV-92-021</u>
LIBERTY NATIONAL LIFE	]	
INSURANCE COMPANY,	]	
DEFENDANT.	]	

BEFORE: HON. WILLIAM H. ROBERTSON, CIRCUIT  
JUDGE

DATE: FRIDAY, OCTOBER 16, 1992, AND MONDAY,  
MARCH 8, 1993

PLACE: BARBOUR COUNTY COURTHOUSE, CLAY-  
TON, ALABAMA

TIME: 10:00 A.M.

REPORTER'S OFFICIAL TRANSCRIPT

APPEARANCES

FOR THE PLAINTIFF: BEASLEY, WILSON, ALLEN,  
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HON. JAMES ALLEN  
MAIN  
HON. THOMAS J.  
METHVIN

FOR THE DEFENDANT: HON. HORACE G. WILLIAMS  
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BY: HON. DONALD M.  
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HON. BRITTIN T.  
COLEMAN  
HON. JAMES W.  
GEWIN

COURT REPORTER: HON. ANDREW J. CLINGAN,  
JR., RPR, CSR  
OFFICIAL COURT REPORTER  
THIRD JUDICIAL CIRCUIT  
ROOM 205 - 303 EAST BROAD  
STREET  
EUFULA, ALABAMA

\* \* \*

[p. 3] WHEREUPON, the following proceedings were  
had and entered of record as follows:

MR. MAIN: We are ready if you are ready for  
us to begin.

THE COURT: Yes, sir.

MR. MAIN: Since it is our motion, if it please  
the Court, I'll begin our argument in favor of certification  
of this class, and that is all I understand we are here for,  
your Honor.

THE COURT: Unless we have some other motions – motion to compel, but we can take care of that, but that is all?

MR. MAIN: Yes, sir. Your Honor, Rule 23 has a requirement in there that the court as soon as practical certify a class. It is our position a certification of a class is a conditional thing throughout the course of a class action, that the court at any time through discovery or at any point in a case can change its mind and make subclasses. Actually, the court can decertify a class if it chooses down the road, and I assume one of the first questions would be why certify a class at the very beginning. Why does it need to be done quickly? Well, the primary reason I would give you is there are statute of limitation problems that bar a cutoff when the class is certified. In other words, if the court certifies this [p. 4] general class, and what we are asking the court is, in simple terms, is a class of Liberty National Life Insurance cancer policyholders whose old cancer policy was switched for a new cancer policy with new benefits –

THE COURT: Fraud?

MR. MAIN: Fraudulently switched for new benefits.

THE COURT: Made a misrepresentation to them it was a good or better policy and switched the policy because the old policy was too good. That is basically what y'all are claiming?

MR. MAIN: Yes, sir, and we have some affidavits. First of all, it is our position that the court can make this decision – either on your motion or its own

motion it could have made the decision based just on the pleadings, but we have some affidavits that we would like to supply the court with of three – we have three affidavits we would like to file.

MR. WILLIAMS: Judge, we are going to object to the affidavits. He's brought something in here we haven't seen, and we haven't had a chance to depose these people, and before this thing can be certified a class action we have to have a chance to depose these people, because that is what they said, we would object to it.

MR. MAIN: I don't think there is any [p. 5] requirement for a deposition, it is determining whether it is in the best interest of this group of people to be certified at this time.

THE COURT: You want to file those with the court? Is that what you want to do?

MR. MAIN: I want to file these with the court, and Robert Stewart – and Robert Stewart is a former president of Liberty National Life Insurance, and a former chairman of the board, and he describes in his affidavit that there are thousands of policies in which – the Liberty National Life Insurance cancer policies in which the old policy was switched for a new policy.

The second affidavit is the affidavit of John Miller, and John Miller has been with Liberty National since 1947. He was a regional vice-president when he retired, and he had a number of agents under him, 250 at the time he retired, that were directly answering to him, and in his affidavit he shows that there was a plan of switching old cancer policies for new ones with diminished benefits.

Your Honor, in a class action there are four things that we have got to show or the court has got to be reasonably satisfied with in order to certify the class. One is numerosity, that there are enough claims of the same likeness that it is judicially economic to do it in one. [p. 6] And I think those affidavits – typicality and commonality are the other two. And it is our position that these claims are all typical in that an old policy was replaced by a new policy with lesser benefits. And then the last item is adequacy of the class representative, and there is an affidavit of the class representative in which he testifies that he will be more than energetic in pursuing this matter, certainly willing to answer any questions.

Your Honor, I don't know of anything specific that I have other than what I said, other than that there are very few cases in Alabama on class actions, and the cases that we do have refer to the federal cases on class actions because we copied Rule 23 from the federal ones, and we can supply you a number of cases to the effect that – well, you know, that discovery is not a prerequisite to certification. I would quote one from the – let's see, *Harriss Versus Pan Am World Airways*, 74 FRD 24, Rule 23(c), one clearly contemplates early action by the court, threw out *Newberg On Class Actions*. The language is that the court can determine class certification basically on the pleadings. Section 7.12 of Newberg says that, "Rule 23(c) requires a class ruling 'as soon as practicable' after the commencement of an action. Moreover, the court may alter or amend a class action at any time before the decision on the merits . . . though not [p. 7] specifically permitted by the rule, courts have also altered or amended their class

rulings after merits decisions, but most initial class determinations are based on the pleadings of the parties and are issued at a relatively early stage of the proceedings." I show the court this section from Newberg 7.12 that I just read into the record.

That is all.

MR. WILLIAMS: I heard you state affidavit earlier. Am I to understand this is the one that is supplied affidavits instead.

MR. MAIN: There are three of them. We gave you a stack of three.

MR. WILLIAMS: You gave all –. Is that Charlie Robertson?

MR. COLEMAN: And we need the exhibit to Robert Stewart.

MR. METHVIN: We don't have a copy here, but we can get it for them.

MR. MAIN: The two exhibits that we have on Robert Stewart are the annual report of *Torchmark* and its reference to the twenty-eight million dollars worth of cancer policies that were changed, and we have an exhibit to his where the agent showed him the difference between his old policy and his new policy and misrepresenting to [p. 8] him what the old policy –

MR. METHVIN: It is his old policy and new policy.

MR. COLEMAN: Are you filing copies of them?



MR. WILLIAMS: Judge, I'm going to argue that. I'll leave the technical part of it to Don or Britt. We have a motion to continue filed. This pleading or this amendment to the original complaint, as the original complaint started off, was for a totally different and unrelated problem for which Charlie Robertson claims. But the -

THE COURT: Motion to continue what?

MR. WILLIAMS: Sir?

THE COURT: Motion to continue what?

MR. WILLIAMS: Motion to continue this hearing today as far as -

THE COURT: (Interposing) We are already in the hearing, so I'm going to deny any kind of a motion for continuing. We are going to go on with what we have got. I'm not going to say I'm going to rule on it today, but we are going to make the argument.

MR. WILLIAMS: Well, if we can have some time, and this is not forced on us. I want to bring to the court's attention that we thought we had the time to take the depositions. Tom indicated a couple of dates they [p. 9] would be made available to us, possibly yesterday, and Jere called back and said they are not available. So, we tried to get into this and ask our questions.

THE COURT: All right. Let's go ahead.

MR. WILLIAMS: That will be fine.

MR. JAMES: Your Honor, I think in class action cases the most important part of the case is the class certification issue. You are either trying an individual

man's case or you are trying a thousand or two thousand or twenty thousand people's cases. So, the most important thing in the case is the class certification issue. When we got certification, of course, on or about October 5th with this amended complaint, our response was filed day before yesterday, I guess within the ten days, asking for more definite statements about what Mr. Robertson says was done to him, and what was said to him that he says is false, and who said to it to him, and when it was said to him, and what he did in reliance on it, and how he was damaged. That is not in the pleadings except in a very broad brush sense, and so we are here today, about ten days after we got served with a complaint, addressing issues about class certification, which is the most important issue in the case I believe, without really knowing what Mr. Robertson is claiming, who he says said something wrong to him, what was wrong with that. As we understand it, he [p. 10] is claiming an individual agent - unnamed individual agent of Liberty National said something to him in a conversation about his policy that he contends to be fraudulent, and they want to bootstrap from that to say the same thing was said to thousands and thousands of other policyholders. And there are probably hundreds of different agents involved. So, one of the monumental problems in this case is this is, as pled, a basic claim of misrepresentation by an individual Liberty National agent to an individual policyholder. And what was said in that conversation is the gist of the case. Was it a misrepresentation or was it not? Was there reliance on it? Was the plaintiff damaged? So, our principle thrust, your Honor, is first of all, the class certification is way premature because we don't know what Charlie

Robertson is contending. We don't know what these other people are saying happened to them, and we don't have an opportunity to know whether he has really just got an individual claim or whether he, in fact, has some claim that is common to all of these other thousands of people that they say made an exchange.

THE COURT: Do you have any authority? They have given me some authority about certifying it as seriously as possible and practical and all that. Do you have -

MR. JAMES: (Interposing) Yes, sir, we have a [p. 11] brief which we will -

THE COURT: (Interposing) Y'all have already filed a brief?

MR. MAIN: Yes, sir.

MR. JAMES: Yes, sir. Your Honor, they have made some arguments that discovery is not appropriate in class certification hearings. I'll quote to you, and this is in our brief, so I won't belabor it, and Mr. Mane is correct, there is not a great deal of class action law in the State of Alabama, but the Supreme Court has recognized that they looked at federal law as persuasive because it is the same rule, no change.

There is some Alabama law that we will cite to your Honor which supports our position, but by and large it is federal law. The Second Court of Appeals has said in a case I cite, they fail to allow discovery. This is a quote, "Where there are substantial factual issues relevant to certification of the class, makes it impossible for the party seeking discovery to make an adequate presentation either in its memoranda of law or at the hearing on the

motion if one is held." And we are here, as we understand it, on a hearing on their motion on a little old -

THE COURT: (Interposing) What are you asking for? Are you asking to take what, depositions before -

MR. JAMES: (Interposing) We asked Tom Methvin [p. 12] - we asked Tom whether he was going to put on witnesses today. He said he was going to put on a plaintiff and a couple of other people, and then he sent me a notice yesterday identifying Miller and Stewart or day before yesterday, and we talked about trying to get them scheduled for depositions, and I asked Jere yesterday and with the shortness of time we can't produce them for the deposition. We need to understand, your Honor, what these people are contending. We don't know how many people are similarly situated with these people, what policies that they exchanged for what policy. Our records show that the plaintiff here, Mr. Robertson, has never had a claim under his old policy or his new policy, and yet he is seeking to represent people who may have had claims under one policy or another Policy, but we need to be able to take his deposition, find out why he thinks he has been hurt, that he makes the bald allegation that one policy is better than the other policy. We think it is appropriate for the court to hear testimony from qualified experts as to whether, in fact, one policy is better than the other.

THE COURT: Well now, that would come on a summary judgment motion whether there is any kind of - you know, I don't need to know that to determine whether it is a class or not.



MR. JAMES: We think, your Honor, that the Rule [p. 13] 23 requires you to make several factual and legal determinations, just a finding of fact in order to certify a hearing, and it is based on an evidentiary hearing at which testimony, subject to cross-examination, ought to be proper.

THE COURT: What are you all - what is your position on it?

MR. MAIN: Your Honor, there is no requirement for an evidentiary hearing, period, for a class certification. The section I gave you on Newberg says it can be done on the pleadings. We have gone further than that and given you affidavits. You do not go to the merits of the case on the class certification because it would be giving the defendants two bites at the apple. The plaintiff would have to prove his case twice.

MR. JAMES: You don't get to the merits, but there are many factual and legal issues, and I would like to talk about what those are.

THE COURT: Okay.

MR. JAMES: Let me say Mr. Mane [sic] has cited Newberg. I'll quote Newberg. Newberg is like a lot of other people in his book, and they are in different context, but, "Discovery by the defendant," that is, "class representatives may be appropriate in order to probe affidavits submitted in support of the class action, to [p. 14] test the plaintiff's alleged typicality of claims," that is how Charlie Frank Robertson relates to these other thousands of people who is purported to represent, "to challenge specific areas which the defendant reasonably

believes involved potential conflicts with class member . . . " We think clearly some people as Piedy [sic] says, hindsight is fifty-fifty. Some people are better off with an old policy and some people are better off with a new policy. Charlie Frank Robertson doesn't know yet because he has never had a claim whether he is better off under one than the other.

Then, they are saying you are supposed to certify immediately. The Second Circuit says, the language "as soon as practicable after commencement of the action" does not mandate precipitate action.

THE COURT: All right. You agree with him the facts that you say I've got to find are those four basic qualifications?

MR. JAMES: You have got to find two sets of facts here. There is 23(a) says you got to find all of the following. The class is so numerous that joinder of all members is impractical.

THE COURT: Well, I assume y'all admitted that if they have all the policyholders.

MR. JAMES: I haven't seen the affidavit. I [p. 15] didn't get a chance to read it and I don't know how many there are. Number two, there are questions of law or fact common to the class.

THE COURT: The claims and defenses of the representative party are typical of the claims and defenses of the class, in other words, Charlie Frank Robertson is just like everybody else he purports to represent, and the representative party will fairly and adequately represent the interest of the class, that is both



with respect to Charlie Frank Robertson and his lawyers. Whether they have got some conflict I don't know, but they are purported to represent one class of people here and another class of people here, and then if you make all of those four findings based on records, then there are three different - three different kinds of class actions.

One, is if Charlie Frank is trying his case individually, and that is what we believe he has is an individual claim of fraud, is trying his claim individually, has some preclusive effect on somebody else who may have changed or exchanged claims. We say it can't possibly be a preclusive case, it is not a (b)(1) class, a (b)(2) class, is an injunctive or declaratory relief case, and I don't believe they are asking for injunctive -

THE COURT: (Interposing) I think they are asking for more.

[p. 16] MR. MAIN: We are asking for a (b)(2) class. We are asking that they be enjoined from continuously swapping old policies for new policies with a lesser benefit and, so, we are asking for that.

MR. JAMES: Then (b)(3) is the money damages class.

THE COURT: You are asking for that?

MR. MANE [sic]: We are asking for that.

THE COURT: And then the court, according to the rule, has defined that the question of law or fact common to the members of the class predominant over questions affecting only individual members.

MR. JAMES: Now, your Honor, there are a number of points here. One, they are purporting to represent all people who exchanged Liberty National policies. We have got these policyholders in a large number of states. Presumably an agent having a communication with an insured in Georgia that is alleged to be fraudulent is governed by Georgia law. One in Mississippi is governed by Mississippi law, one in Florida is by Florida law. So, we don't believe there is a common question of law in this huge class that that is purporting to represent. Secondly, and probably the most important point, is the question of fact as what the individual agent said to the insured in the sales agreement, and that is different in every case. [p. 17] That is different with every case. If I understand the affidavit from Mr. Stewart, he says he had a policy with an agent in Birmingham and an agent in Birmingham said something to him. Okay. Charlie Frank Robertson's agent is over here in -

THE COURT: (Interposing) If I understand this case, the whole deal is it was a plan or a scheme by Liberty National for trading out and getting people to give up their old cancer policy for a new cancer policy, and wouldn't pay the benefits, and he saved Liberty National a lot of money.

MR. JAMES: That is a bare allegation in the complaint, and I think it is incumbent upon the court before you certify a class based on that allegation, we don't try the merits but that you have an opportunity to find out what it is Charlie Frank said to him and why it is, in fact, of lesser value to him. And we are - I mean, we are not to that point yet, your Honor.

THE COURT: Well, that point is a point that would be taken up on Motion for Summary Judgment. You know with the merits of it that is getting into the merits of whether the policy is good or bad, you know better or worse. That is something you got that doesn't have anything to do with certifying the class as I see it.

MR. JAMES: Well, I agree with your Honor that [p. 18] Charlie Frank's case is something that can be presented. I mean, there may be a dispute in the testimony and it wouldn't be subject, but the issue there is the communications between Charlie Frank and the agent, and they are asking you to certify a class of all of these thousands of people based on what they claim.

THE COURT: Let me ask you this. What do you propose that you be allowed to do before I make the ruling?

MR. JAMES: We think, your Honor, that we should have an opportunity to depose the people who are submitting affidavits here in support of this, that we have an opportunity to come in and put on our evidence, and that the court have an opportunity -

THE COURT: (Interposing) What kind of evidence do you purport to put on?

MR. JAMES: Well, we intend to put on, if we have an opportunity to do it, the people from the Eufaula office of Liberty National who dealt with Mr. Robertson. We would like to put on an actuary to talk about the issues raised in these affidavits about what the differences in these policies are, we would put on whatever numerical statistical information -

THE COURT: (Interposing) That is getting into the factual part of whether the policy is better or worse. That is something we have got to deal with down the road. [p. 19] That doesn't have anything to do with the class as I see it.

MR. JAMES: Well, your Honor has got to find, as I understand the rule, that the questions of law and the questions of fact are all -

THE COURT: (Interposing) Well, that is going to be - that is going to be the question, whether the policy, assuming whatever else they say is right, that you went out and changed it, whether the second policy or the first policy is the best. Right? I mean, that is what the whole lawsuit is going to turn on.

MR. JAMES: Well, I think the issue is the policies are different. They are different.

THE COURT: Okay. You know, they are alleging it was a fraud, that the whole company has set out to defraud the policyholders by exchanging a policy that wouldn't pay as much for one that would. Now isn't that it?

MR. MAIN: Yes, your Honor. And, may I interject for just a moment, we are only asking that you conditionally - all certifications of all class actions in my opinion are conditional since the court has to cut off the tolling of statute, but discovery goes on three or four months.

THE COURT: Now, we are not going to do it that [p. 20] long, I guarantee you that.

MR. MAIN: Well, it could take that long.



THE COURT: It ain't going to take that much time. So, that is enough, go ahead.

MR. JAMES: Okay. And, your Honor, the rule says you are supposed to be able to find, based on the evidence presented to you, that a class action is superior to any other way; that is, superior to having people litigate their own individual claims.

THE COURT: Well, if you got a thousand claims that is going to be superior, ain't it?

MR. JAMES: Well, I think that is up to what an individual - some insured might want to -

THE COURT: (Interposing) Well, that doesn't have to be a member of the class.

MR. JAMES: On a (b)(3) they have the right to opt out.

THE COURT: And file a suit.

MR. JAMES: And, you are supposed, your Honor, to consider the desirability or undesirability of concentrating the litigation of the claims in the particular forum. Whether this is the right forum for you to try every cancer exchange Liberty National did, and that is something that the rules say you are to consider.

THE COURT: Where else could it be done?

[p. 21] MR. JAMES: It could be anywhere where there are more policyholders, a larger based policyholder -.

THE COURT: Can you get the thing into federal court some kind of way?

MR. JAMES: We would like to.

THE COURT: I would like for you to.

MR. JAMES: And then the last thing are the difficulties of managing a class action, particularly in this forum, or managing class actions generally. Now, I need to respond to some things.

The plaintiff has the burden of proof of establishing to you that all of these prerequisites have been met, and we submit we have the right to challenge that, and with every - a due process right to be ready to challenge it and take depositions and have adequate notice and opportunity to put on some evidence. Now, they say it is just conditional - the certification conditional and you can change your mind. There are a number of cases that we have cited that says while the rule says the court can conditionally certify you still have to make the findings of facts and conclusions under Rule 23, conditional certification doesn't mean maybe it's going to be certified or we will let you put on some stuff next month or whatever to see whether it really ought to be a class action, that is not what conditional certification means. Conditional [p. 22] certification means you have, first, got to go through all the hoops and do it right, then the court can always change its mind after it has gone through the hoops.

THE COURT: Getting back to this, you want to take the deposition of these three folks who filed affidavits?

MR. JAMES: Yes, sir.

THE COURT: All right.



MR. JAMES: And we would like to have a reasonable time period; and we have got your order last week to prepare our case – to put on our case.

THE COURT: All right. What kind of case do you have? We are not going to get into a factual deal about whether it is fraud committed or what somebody said to another one. That is not what we are talking about in certifying the class.

MR. JAMES: Well, we think that is at collateral issue whether somebody ought to be class. We are not going to try a bunch of cases here, but we need to understand what Mr. Robertson says his claim is and how it arose.

THE COURT: All right, I understand that. But you are not going to come get somebody up here – to put somebody on that will say he did not tell him that. We are not going to litigate that. I believe you have a right – [p. 23] I believe you have to find out what they say happened, but we are not going to get on certifying the class. Now, when you get to the summary judgment thing, then whatever you want to put in is fine. But to have a disputed fact situation, I don't see how that can have any effect on whether the class is certified or not.

MR. JAMES: Your Honor, only in the sense that Mr. Robertson like every other policyholder's claim is based on what an individual agent told him in an individual conversation.

THE COURT: I understand that, and you understand he is – the agent is going to say one thing and he is going to say another.

MR. JAMES: Like thousands of other folks.

THE COURT: So, there is no need to put that on about a class action. That is a summary judgment thing, okay.

MR. JAMES: The allegation is that the company set out to do this with some evil motive.

THE COURT: Right.

MR. JAMES: We believe in the certification hearing the court needs to see and hear what the company did and how it proceeded to train agents for purposes of informing insureds about the opportunity to exchange policies. And we believe we have the right to demonstrate [p. 24] to the court that some people exchanged and some people didn't.

THE COURT: Well, I'm sure they will stipulate some people exchanged and some people didn't.

MR. JAMES: But I believe they are making bare allegations about what the company's motive –

THE COURT: (Interposing) Well, that is all the facts – they have got to prove all of those. They have got to prove those, but, you know, what bearing has that got on whether it is a class or not?

MR. JAMES: Because, your Honor, you have to make the determination that the basis of their claim, the basis is common to everybody.

THE COURT: Well, the basis of their claim is that Liberty National set out with an intent to defraud all the policyholders into trading policies. Now, that is going

to be common to everybody, if that is their claim, and that is what I understand the claim to be.

MR. JAMES: But, your Honor, we believe that you have to not try it on the merits, but it is incumbent upon you to hear what the basis of their claim is.

THE COURT: I understand that. I agree with you. I agree with you, but you don't think you have the right to come in and try to defend that claim?

MR. JAMES: No, sir, I'm not talking about [p. 25] defending the claim. I can distinguish between circumstances wherein a security is offering - there is a mass mailing to thousands of people that all contains the allegedly fraudulent statement. Okay. That is class action material versus a claim that is based just on what Ronnie Peel over in Eufaula said to Charlie Frank Robertson. And you need to understand, I think, that is what the hearing is all about. You've got to find that the basis of the claim is common to all of these thousands of people.

THE COURT: Okay. Well, you know I've got to know what the basis of the claim is.

MR. JAMES: Yes, sir.

THE COURT: The basis of the claim, as I understand from the plaintiff, this is not something that Ronnie Peel did, it is something that Liberty National in Birmingham did or wherever they made the decision to do that - that they intended to exchange these policies, as many as they could, because they were defrauding the people with intent to defraud the people to exchange the policies to give them one that would pay them less rather than one that they had that was paying more.

MR. JAMES: But, that is something that needs to be presented to your Honor to form a basis of your findings and conclusions on class certification. I mean, [p. 26] all we have today is a bare pleadings, and an affidavit that he has handed to us at the beginning of the hearing with no opportunity to cross-examine, that they are saying accept everything we tell you is true, Judge.

THE COURT: Wait a minute, I'm going to let you depose these folks. I'm trying to figure out how much further we are going than that. Okay?

MR. JAMES: Okay. We talked about the conditional certification, I think if you look at the cases you will see that doesn't mean you just come in and certify it on day one.

THE COURT: I ain't fixing to do it today.

MR. JAMES: Okay. An issue that ought to be heard by your Honor is whether Robertson has the standing to represent other people that they want to include in the class. Robertson, as I mentioned earlier, based on our records has had no claim earned under the old policy or the new. Now does he have standing to come in and challenge the exchange for somebody who exchanged, and is a lot better off for exchanging, because they get more benefits under the new policy than the old policy? He is exchanging that policy -

THE COURT: (Interposing) Is this Louise Peel's case? Is this the same type case?

MR. MAIN: I'm not familiar.

[p. 27] MR. METHVIN: Yes, that is a cancer exchanged -



THE COURT: And that is one you want -

MR. METHVIN: (Interposing) It's going to settle. It is just filed separately.

MR. JAMES: And Louise Peel, is it alleging she got her own case?

THE COURT: This is one that y'all put in the class.

MR. METHVIN: Probably.

MR. MAIN: Your Honor, may I expound on that just a minute?

The way we expect, and the way the plaintiff's would prefer this to go, would be to have a conditional certification of the general class of people whose policies were switched from an old policy to a new policy with a lesser benefit, and then as the discovery went along the Court would revisit this, if there were sub-classes that needed to be identified and have specific class representatives and dealt with differently such as damages, there may be people who have a lesser valued policy but haven't had cancer and their damages are certainly different than those who have a lesser valued policy and have had cancer. There is a potential for a third group of people if there was an attempt to switch the [p. 28] policy, the policy they did not switch, but that original group has diminished, so that the claims experience -

THE COURT: Is attempted fraud?

MR. MAIN: Sir?

THE COURT: Attempted fraud?

MR. MAIN: Because of the scheme and this policy and procedure their remuneration has gone up four hundred percent.

I would point out to the court, we just did file the affidavit and the other court has not had an opportunity to read them, but one of these affidavits, Robert Stewart was president of Liberty National until 1986, and he was then a senior vice-chairman of *Torchmark*, and the other one was a regional vice-president of Liberty until 1990, and both of them have described this policy or Procedure for switching old for new with diminished benefits. There is no evidentiary hearing needed for the determination of the initial class certifications for conditional fraud class in our judgment. And it sounds like they want to litigate the merits.

THE COURT: That is what it sounds like to me, and I'm not going to allow that.

MR. JAMES: Well, I'm not suggesting you litigate the merits.

THE COURT: Okay. I'll continue this hearing. [p. 29] How long can you all - I'll let you take the depositions - these three depositions that you wanted to take. Okay?

MR. JAMES: Okay.

THE COURT: Can we get this done in the next ten days or two weeks?

MR. MAIN: Your Honor, Miller and Stewart, we will have to - we do - they are not named plaintiffs, and we don't have total control over them coming to court like we would our own client.



THE COURT: Well, you can notice -

MR. JAMES: We can send them a subpoena.

MR. MAIN: We will work with them to try to get it within ten days to two weeks.

THE COURT: Well, if you want to notice them and subpoena them and all that it is going to take longer. Why don't y'all see what days you can take them and set a date and come back here and I'll let you put on what you want to put on.

MR. JAMES: That is fine.

MR. WILLIAMS: That is basically what we wanted, your Honor, thank you.

THE COURT: Horace, I knew what you wanted to start with, and I was going to try to agitate you because you are such a nice fellow.

MR. WILLIAMS: Thank you, Judge.

[p. 30] (THEREUPON, court stood adjourned.)

\* \* \*

MONDAY, MARCH 8, 1993. 1:05 P.M.

WHEREUPON, the following proceedings were had and entered of record as follows, to-wit:

MR. BEASLEY: Judge, we are submitting our class certification on the matters that were taken up at the last hearing, and the matters presented at that time including all the affidavits that were filed by the plaintiff. And we would ask that the class be certified today based

on that record. And the class that we are asking - I'll just read what we feel is the class. "All the past and present insureds under cancer policy issued by the Liberty National Life Insurance Company, providing unlimited coverage for radiation, chemotherapy, and out of hospital prescription drugs, which coverage was effective on or after August 29, 1986, the date that Liberty National offered new replacement cancer policies limiting coverage for radiation, chemotherapy, and out-of-hospital prescription drugs," which we refer to as the new policy, "excluding from the certified class any insured, who, on or before the date of this class certification request, has filed a separate action against Liberty National asserting claims arising out of the cancer policies on coverage."

And we would ask that the class be certified [p. 31] under Rule 23(b)(2) of the Alabama Rules of Civil Procedure.

MR. GEWIN: I think the court is familiar with our position in opposition to the motion to certify. The court was gracious enough to permit us to take the depositions of Mr. Miller, who has also given an affidavit, a Mr. Stewart who has given an affidavit, and Charlie Frank Robertson. And we would submit our depositions in opposition, a copy of those, if it is not on file, it will be shortly.

THE COURT: All right. I'll take it under submission. Is that all we can do today?

MR. BEASLEY: Yes.

THE COURT: Thank you very much.

(THEREUPON, court was adjourned.)

\* \* \*

[p. 32] IN THE CIRCUIT COURT WITHIN AND FOR  
THE COUNTY OF BARBOUR  
STATE OF ALABAMA

CHARLIE FRANK ROBERTSON,	]	
	]	
PLAINTIFF,	]	
	]	
VS.	]	<u>CIVIL ACTION</u>
	]	<u>NO. CC-92-021</u>
LIBERTY NATIONAL LIFE	]	
INSURANCE COMPANY,	]	
	]	
DEFENDANT.	]	

REPORTER'S CERTIFICATE OF COMPLETION

I, ANDREW J. CLINGAN, JR., RPR, CCR, Official Court Reporter for the Third Judicial Circuit of Alabama, do hereby certify that I have this date completed the original of a true and correct transcript of the notes of the evidence and matters [sic] taken by me in the foregoing cause on the dates herein before stated by means of Computer-Assisted Transcription by CIMMARON as designated by counsel for the Plaintiff. All pages are numbered serially in the top right-hand corner, and ending with the page number appearing at the top of this certificate.

Dated this the 23rd day of April, 1993.

/s/ Andrew J. Clingan, Jr.  
Andrew J. Clingan, Jr.

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON,	*	
for himself, and in his	*	
representative capacity for the	*	Case Number:
class of persons described	*	CV-92-021
herein,	*	
	*	
	*	Plaintiff,
	*	
vs.	*	
	*	
LIBERTY NATIONAL LIFE	*	
INSURANCE COMPANY,	*	
	*	
	*	Defendant.

ORDER SETTING HEARING

Plaintiff's motion for an Order to Certify this Action as a Class Action, having been filed previously, set once, and continued by the Court due to representations by counsel for Defendant that this action and other related cases were to be settled, and the Court, having been advised that no settlement was reached, is of the opinion that a hearing is needed. It is therefore Ordered, pursuant to Rule 23, A.R.Civ.P., that a hearing for class certification be held on the 8th day of March, 1993 at 9:00 a.m. at the Courthouse in Clayton, Alabama.

The Clerk shall give notice of the hearing to all counsel of record.

DATED: January 29, 1993.

/s/ William H. Robertson  
CIRCUIT JUDGE

Jere L. Beasley  
 Walter R. Byars  
 Horace G. Williams  
 Donald M. James  
 Brittin T. Coleman

---

**IN THE CIRCUIT COURT FOR  
 BARBOUR COUNTY, ALABAMA  
 Clayton Division**

JAMES L. GOULD and  
 DOROTHY N. GOULD,

Plaintiffs,

vs.

LIBERTY NATIONAL LIFE  
 INSURANCE COMPANY,

Defendant.

•  
 •  
 •  
 •  
 • Case Number:  
 • CV-93-024  
 •  
 •

**COMPLAINT**

(Filed March 8, 1993)

**Statement of the Parties**

1. Plaintiffs are each over the age of 19 years and reside at Route 1, Box 69, Clopton, Alabama.

2. Defendant is a domestic corporation with its principal place of business located in Birmingham, Jefferson County, Alabama. Said Defendant does business by agent in Barbour County, Alabama.

**Statement of the Facts**

3. In 1979, Plaintiffs were the owners of a family cancer policy issued by Defendant.

4. On or about the 12th day of March, 1979, Plaintiff James L. Gould took out another cancer policy issued by Defendant.

5. Defendant subsequently contacted Plaintiffs and represented to them that Defendant had a superior policy



with better coverage available and that Plaintiffs should switch over to this new policy.

6. Plaintiffs, in reliance upon the representations, dropped their old policies and took out the proposed policy with Defendant.

### COUNT ONE

7. Plaintiffs reallege paragraphs 1 through 6 of the complaint as if set out here in full.

8. The representations by Defendant were false and Defendant knew that they were false.

9. Plaintiffs relied upon the representations, as aforesaid.

10. As a proximate consequence of the fraudulent representations by Defendant, Plaintiffs were injured and damaged as follows: they dropped a superior policy of insurance and now have a policy that gives them less total coverage than before; they suffered mental pain and anguish and continue to do so; and they have been otherwise injured and damaged.

WHEREFORE, Plaintiffs demand judgment against Defendant in such amount of compensatory damages as may be awarded by a jury; a separate amount of punitive damages; and their costs.

/s/ Jere L Beasley  
JERE L. BEASLEY,  
Attorney for Plaintiffs

OF COUNSEL:

BEASLEY, WILSON, ALLEN,  
MAIN & CROW, P.C.  
Post Office Box 4160  
Montgomery, AL 36103-4160  
(205) 269-2343

### JURY DEMAND

PLAINTIFFS HEREBY DEMAND TRIAL BY JURY  
ON ALL ISSUES OF THIS CAUSE.

/s/ Jere L Beasley  
OF COUNSEL

---

**IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division**

ROBERT I. STEWART; JOHN W. MILLER; and DAN T. HEAD;	*	
Plaintiffs,	*	
vs.	*	Case Number:
LIBERTY NATIONAL LIFE INSURANCE COMPANY,	*	CV-93-025
Defendant.	*	

**COMPLAINT**

(Filed March 10, 1993)

**Statement of the Parties**

1. Plaintiffs are each over the age of 19 years and reside in the State of Alabama.

2. Defendant is a domestic corporation with its principal place of business located in Birmingham, Jefferson County, Alabama. Said Defendant does business by agent in Barbour County, Alabama.

**Statement of the Facts**

3. Plaintiff Robert I. Stewart was the owner of a cancer policy or policies issued by Defendant.

4. Plaintiff John W. Miller was the owner of a cancer policy or policies issued by Defendant.

5. Plaintiff Dan T. Head was the owner of a cancer policy or policies issued by Defendant.

6. Defendant subsequently contacted Plaintiffs and represented to them that Defendant had a superior policy with better coverage available and that Plaintiffs should switch over to this new policy.

7. Plaintiffs had each worked for Defendant in the past and had complete confidence that the representations were true and correct.

8. Plaintiff John W. Miller, in reliance upon the representations, dropped his old policy and each took out the proposed new policy with Defendant.

9. Plaintiffs Robert I. Stewart and Dan T. Head kept their old policies.

**COUNT ONE**

10. Plaintiff Robert I. Stewart realleges paragraphs 1 through 6 of the complaint as if set out here in full.

11. The representations by Defendant were false and Defendant knew that they were false.

12. Plaintiff relied upon the representations, as aforesaid.

13. As a proximate consequence of the fraudulent representations by Defendant, Plaintiff was injured and damaged as follows: he was forced to pay artificially high premiums on the policy he kept because so many policyholders switched to the new policy; he suffered mental pain and anguish and continues to do so; and he has been otherwise injured and damaged.

WHEREFORE, Plaintiff Robert I. Stewart demands judgment against Defendant in such amount of compensatory damages as may be awarded by a jury; a separate amount of punitive damages; and his costs.

### COUNT TWO

14. Plaintiff John W. Miller realleges paragraphs 1 through 9 of the complaint as if set out here in full.

15. The representations by Defendant were false and Defendant knew that they were false.

16. Plaintiff relied upon the representations, as aforesaid.

17. When Plaintiff later learned of the gross fraud involved, he dropped his coverage even though he had previously had cancer.

18. As a proximate consequence of the fraudulent representations by Defendant, Plaintiff was injured and damaged as follows: he lost the benefits of his original policy; he suffered mental pain and anguish and continues to do so; and he has been otherwise injured and damaged.

WHEREFORE, Plaintiff John W. Miller demands judgment against Defendant in such amount of compensatory damages as may be awarded by a jury; a separate amount of punitive damages; and his costs.

### COUNT THREE

19. Plaintiff Dan T. Head realleges paragraphs 1 through 9 of the complaint as if set out here in full.

20. The representations by Defendant were false and Defendant knew that they were false.

21. Plaintiff relied upon the representations, as aforesaid.

22. As a proximate consequence of the fraudulent representations by Defendant, Plaintiff was injured and damaged as follows: he dropped a superior policy of insurance and now has a policy that gives him less total coverage than before; he suffered mental pain and anguish and continues to do so; and he has been otherwise injured and damaged.

WHEREFORE, Plaintiff Dan T. Head demands judgment against Defendant in such amount of compensatory damages as may be awarded by a jury; a separate amount of punitive damages; and his costs.

/s/ Jere L. Beasley  
JERE L. BEASLEY,  
Attorney for Plaintiffs

### OF COUNSEL:

BEASLEY, WILSON, ALLEN,  
MAIN & CROW, P.C.  
Post Office Box 4160  
Montgomery, AL 36103-4160  
(205) 269-2343

### JURY DEMAND

PLAINTIFFS HEREBY DEMAND TRIAL BY JURY  
ON ALL ISSUES OF THIS CAUSE.

/s/ Jere L. Beasley  
OF COUNSEL

---



**IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA**

ROBERT I. STEWART, JOHN W.)	)	
MILLER, and DAN T. HEAD,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION
LIBERTY NATIONAL LIFE	)	CV-93-025
INSURANCE COMPANY,	)	
Defendant.	)	

**JOINT MOTION FOR AND STIPULATION OF  
DISMISSAL WITHOUT PREJUDICE**

COME NOW the Plaintiffs Robert I. Stewart, John W. Miller, and Dan T. Head, and the Defendant Liberty National Life Insurance Company, and hereby jointly stipulate that the above-captioned matter is due to be dismissed, without prejudice, each party to bear its own costs.

/s/ Robert I. Stewart  
Robert I. Stewart,  
Plaintiff

/s/ John W. Miller  
John W. Miller,  
Plaintiff

/s/ Dan T. Head  
Dan T. Head, Plaintiff

/s/ James Allen Main  
James Allen Main  
Jere L. Beasley  
Attorneys for  
Plaintiffs  
Robert I. Stewart,  
John W. Miller, and  
Dan T. Head

OF COUNSEL:

BEASLEY, WILSON,  
ALLEN,  
MAIN & CROW, P.C.  
P.O. Box 4160  
Montgomery, Alabama  
36103-4160  
(205) 269-2343

/s/ Walter R. Byars  
Walter R. Byars, Esq.  
Attorney for Plaintiffs  
Robert I. Stewart,  
John W. Miller,  
and Dan T. Head

OF COUNSEL:

STEINER, CRUM & BAKER  
8th Floor, 8 Commerce Street  
Post Office Box 668  
Montgomery, Alabama 36101-0668  
Phone: (205) 832-8989

/s/ James W. Gewin  
James W. Gewin

/s/ Michael R. Pennington  
Michael R. Pennington  
Attorneys for Defendant  
Liberty National Life Insurance  
Company

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE  
1400 Park Place Tower  
Birmingham, Alabama 35203  
Phone: (205) 521-8000

**IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA**

ROBERT I. STEWART, JOHN W.)	)	
MILLER, and DAN T. HEAD,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION
LIBERTY NATIONAL LIFE	)	CV-93-025
INSURANCE COMPANY,	)	
Defendant.	)	

**ORDER**

The parties to the above-styled action, having filed a Joint Motion for and Stipulation of Dismissal Without Prejudice, each party to bear its own costs.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, & DECREED this action being the same is hereby dismissed without prejudice, each party to bear its own costs.

7-19-93

/s/ W. H. Robertson  
Circuit Judge

**IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division**

CHARLIE FRANK ROBERTSON, *	*	
for himself, and in his	*	
representative capacity for the	*	Case Number:
class of persons described	*	CV-92-021
herein,	*	
	*	
Plaintiff,	*	
vs.	*	
LIBERTY NATIONAL LIFE	*	
INSURANCE COMPANY,	*	
Defendant.	*	

**ORDER CERTIFYING CLASS**

(Filed March 10, 1993)

Having considered the evidence and law presented by the parties to this cause, it is, subject to alteration or amendment under Alabama Rules of Civil Procedure 23(c), ORDERED by the Court as follows:

1. *Class Certification.*

Civil Action No. CV-92-021 shall be maintained as an *Alabama Rules of Civil Procedure* 23(b)(2) class action on behalf of the following class of Plaintiffs:

All past and present insureds under cancer policies issued by Liberty National Life Insurance Company ("Liberty National") providing unlimited coverage for radiation, chemotherapy, and out of hospital prescription drugs ("old policy"), which coverage was effective on or after August 29, 1986, the date that Liberty National offered

new replacement cancer policies limiting coverage for radiation, chemotherapy, and out of hospital prescription drugs ("new policy"), excluding from the certified class any insured, who, on or before the date of this class certification order, has filed a separate action against Liberty National asserting claims arising out of the cancer policies on coverage.

with respect to the following causes of action:

- a. Claims by Plaintiffs for declaratory relief, particularly: (1) the declaration that the Plaintiffs' prior cancer policies entitled them to substantially greater coverage for radiation and chemotherapy treatment, as well as drug payments; (2) that Plaintiffs are entitled to be paid pursuant to their prior cancer policies' provisions for radiation and chemotherapy treatment, and drug payments; (3) claims that Liberty National Life Insurance Company fraudulently, willfully, or wantonly switched the cancer policies as described in Plaintiffs' Amended Complaint.
- b. Claims by Plaintiffs for injunctive relief to prospectively prevent Liberty National Life Insurance Company from continuing to switch cancer policies under the pretext that the new policies are superior to the old policies;

2. *Class Representatives; Class Counsel.* Charlie Frank Robertson is designated class representative for the class. Jere L. Beasley, Frank M. Wilson, James Allen Main, and Walter R. Byars are designated as counsel for the class.

DATED: March 10, 1993.

/s/ William H. Robertson  
WILLIAM H. ROBERTSON  
CIRCUIT JUDGE

---



IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, *	*	
for himself, and in his	*	
representative capacity for the	*	Case Number:
class of persons described	*	CV-92-021
herein,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
LIBERTY NATIONAL LIFE	*	
INSURANCE COMPANY,	*	
	*	
Defendant.	*	

**ORDER**

(Filed March 10, 1993)

This matter coming on to be heard with respect to the allegations contained in Counts One and Two of the Plaintiff's complaint, the Court hereby finds that Counts One and Two of the complaint are due to be and the same are hereby dismissed, with prejudice.

This Order shall not effect the pendency of the remaining Counts (Three and Four).

DONE and ordered this 10th day of March, 1993.

/s/ William H. Robertson  
WILLIAM H. ROBERTSON  
CIRCUIT JUDGE

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK	§	
ROBERTSON, for himself,	§	
and in his	§	
representative capacity	§	Case Number:
for the class of persons	§	CV-92-021
described herein,	§	
	§	<b><u>ORAL ARGUMENT</u></b>
Plaintiff,	§	<b><u>REQUESTED</u></b>
	§	
vs.	§	BY <u>M. Kathleen</u>
	§	<u>Miller</u>
LIBERTY NATIONAL LIFE	§	
INSURANCE COMPANY,	§	
	§	
Defendant.	§	

**MOTION FOR LEAVE TO INTERVENE**

(Filed April 30, 1993)

Come now Willard C. Griffith, Sara E. Griffith, Dawn R. Tubb, Edith E. Fellows, Edna F. Brock, Guy Adams, Alice S. Adams, Johnny L. Fellows, Floyd E. Nelson, Delores H. Nelson, Arnold F. Pitt and Almitta Pitt, who are Plaintiffs in certain civil actions filed in the Circuit Court of Mobile County ("Intervenors"), and, on their own behalf and on behalf of other Plaintiffs in Mobile County who have claims against Defendant Liberty National Life Insurance Company but have not yet filed their cases in the Circuit Court of Mobile County, move the Court pursuant to Rule 23(d) of the Alabama Rules of Civil Procedure for leave to intervene in this action for the purpose of moving the Court to amend its order

certifying a class as is set forth in Intervenor's motion to amend order certifying class filed on even date herewith.

ARMBRECHT, JACKSON, DeMOUY,  
CROWE, HOLMES & REEVES  
Post Office Box 290  
Mobile, Alabama 36601  
(205) 432-6751

By: /s/ W. Boyd Reeves / MKM  
W. Boyd Reeves

By: /s/ Norman E. Waldrop Jr. / MKM  
Norman E. Waldrop, Jr.

By: /s/ M. Kathleen Miller  
M. Kathleen Miller

#### CERTIFICATE OF SERVICE

I hereby certify that I have on this the 29th day of April, 1993 served a copy of the foregoing pleading on

Jere L. Beasley, Esq.  
Beasley, Wilson, Allen, Main & Crow, P.C.  
Post Office Box 4160  
Montgomery, AL 36103-4160

Walter R. Byars, Esq.  
Steiner, Crum & Baker  
Post Office Box 668  
Montgomery, AL 36101-0668

James W. Gewin, Esq.  
Bradley, Arant, Rose & White  
1400 Park Place Tower  
2001 Park Place  
Birmingham, AL 35203

Horace G. Williams, Esq.  
Post Office Box 896  
Eufaula, AL 36072-0896

by mailing the same by United States mail properly addressed and first class postage prepaid.

/s/ M Kathleen Miller

---

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK :  
ROBERTSON, for himself, and: :  
in his representative capacity :  
for the class of persons : CASE NO. CV-92-021  
described herein, :  
Plaintiff, : **ORAL ARGUMENT**  
 : **REQUESTED**  
vs. : **BY /s/ Bill Roedder**  
LIBERTY NATIONAL LIFE :  
INSURANCE COMPANY, :  
Defendant. :

**MOTION FOR LEAVE TO INTERVENE**

(Filed June 14, 1993)

Come now Eunice W. Long, Marsha N. Britton, and Jewel N. Jones, who are Plaintiffs in certain civil actions filed in the Circuit Court of Mobile County, Alabama ("Intervenors"), and move the Court pursuant to Rule 23(d) and Rule 24 of the Alabama Rules of Civil Procedure for leave to intervene in this action for the purpose of moving the Court to: (1) grant Intervenors the right to conduct certain discovery necessary for a hearing on Intervenors' Petition; (2) reconsider its order of March 10, 1993, certifying a class action under Rule 23(b)(2) of the Alabama Rules of Civil Procedure; and (3) upon reconsidering said order, to modify, amend, or vacate its order certifying a class as is set forth more fully in the Intervention Petition filed herewith.

As grounds for this motion, Intervenors show the Court that they have an interest relating to the transaction which is the subject of this action and that they are so situated that the disposition of the action may as a practical matter, impair or impede their ability to protect those interests. Intervenors further show that their interest is not adequately represented by the existing parties.

/s/ Bill Roedder  
William C. Roedder, Jr.  
W. Alexander Moseley  
Attorneys for Intervenors

Of Counsel:

HAND, ARENDALL, BEDSOLE, GREAVES &  
JOHNSTON  
Post Office Box 123  
Mobile, Alabama 36601  
(205) 432-5511

**CERTIFICATE OF SERVICE**

I do hereby certify that I have, on this 10th day of June, 1993, served a copy of the foregoing pleading on counsel of record for all parties to this proceeding, by placing same in the United States mail, properly addressed and first class postage prepaid.

/s/ Bill Roedder

*Counsel of Record:*

Jere L. Beasley, Esq.  
Beasley, Wilson, Allen,  
Main & Crow, P.C.  
Post Office Box 4160  
Montgomery, AL 36103-4160



Walter R. Byars, Esq.  
Steiner, Crum & Baker  
Post Office Box 668  
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James W. Gewin, Esq.  
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1400 Park Place Tower  
2001 Park Place  
Birmingham, AL 35203

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Post Office Box 896  
Eufaula, AL 36072-0896

W. Boyd Reeves, Esq.  
Norman E. Waldrop, Jr., Esq.  
M. Kathleen Miller, Esq.  
Armbrecht, Jackson, Demouy,  
Crowe, Holmes & Reeves  
Post Office Box 290  
Mobile, AL 36601

---

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK	:	
ROBERTSON, for himself, and	:	
in his representative capacity	:	
for the class of persons	:	CASE NO. CV-92-021
described herein,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
LIBERTY NATIONAL LIFE	:	
INSURANCE COMPANY,	:	
	:	
Defendant.	:	

**INTERVENTION PETITION**

(Filed June 14, 1993)

Come now Eunice W. Long, Marsha N. Britton, and Jewel N. Jones ("Intervenors"), and file this their Intervention Petition. Intervenors herein seek the following relief: (1) Intervenors seek the right to conduct certain discovery necessary for a hearing on their petition; (2) a reconsideration by this Court of its order of March 10, 1993, certifying a class action under Rule 23(b)(2) of the Alabama Rules of Civil Procedure; and (3) upon reconsidering said order, Intervenors seek modification, amendment, or vacation by the Court of its order certifying a class.

Intervenors seek the following regarding modification, amendment, or vacation of the said order: (A) modification of the order so as (i) to add a provision to allow Intervenors to opt out of the class, and (ii) to further

provide that the findings, ruling, verdict, judgment, and other proceedings conducted in this action in the Circuit Court of Barbour County, will have no affect [sic] on and will not be binding on Intervenor and that neither they nor Liberty National will be bound, estopped or precluded in any manner (including the doctrines of res judicata and collateral estoppel) from fully and fairly litigating their claims in the actions they have filed in the Circuit Court of Mobile County, Alabama; (B) amendment of the said order so as (i) to certify a class under Rule 23(b)(3) rather than Rule 23(b)(2), and (ii) to further provide that the findings, ruling, verdict, judgment, and other proceedings conducted in this action in the Circuit Court of Barbour County, will have no affect [sic] on and will not be binding on Intervenor and that neither they nor Liberty National will be bound, estopped or precluded in any manner (including the doctrines of res judicata and collateral estoppel) from fully and fairly litigating their claims in the actions they have filed in the Circuit Court of Mobile County, Alabama; or (C) vacation of said order and decertification of the class.

#### A.

**Intervenor move the Court to modify the order certifying a class so as to add a provision to allow Intervenor to opt out of the class on the following grounds:**

1. Intervenor have suits pending against Liberty National and others in the Circuit Court of Mobile County, Alabama in which they seek monetary damages for fraud and misrepresentation, among other causes of actions.

2. Intervenor wish to and have in fact exercised their rights to pursue their independent suits for damages against Liberty National before a jury in the Circuit Court of Mobile County, Alabama.

3. Intervenor are represented by Mobile counsel, William C. Roedder, Jr. and W. Alexander Moseley, Hand, Arendall, Bedsole, Greaves & Johnston, Post Office Box 123, Mobile, Alabama 36601.

4. Pursuance of the Intervenor's claims in the Circuit Court of Barbour County would not be convenient for the parties or the witnesses, and would not be in the interest of justice. All of the Intervenor reside in Mobile County, Alabama; the individual defendants in the pending suits in Mobile County are, upon information and belief, residents of Mobile County; the company defendant in the Mobile County law suits does business in Mobile County; and the insurance policies in question were marketed and delivered to Intervenor in Mobile County by Liberty National agents working in Mobile County.

5. Intervenor are seeking monetary damages as opposed to declaratory and injunctive relief in the Mobile County, Alabama law suits. The class certification order of March 10, 1993, certifies the class for causes of action that seek exclusively declaratory and injunctive relief.

6. Forcing the Intervenor to litigate their claims under the class certified in the Circuit Court of Barbour County unconstitutionally denies the Intervenor the right to pursue their individual claims in the Circuit Court of Mobile County, Alabama.

**B.**

**In the Alternative, Intervenor move the Court to amend its order certifying this action as a 23(b)(2) class action so as to convert it to a 23(b)(3) class action on the following grounds:**

1. A class action that meets the requirements of Rule 23(b)(2) will also meet the less severe requirements of Rule 23(b)(3).

2. The individual members in the class action have a strong interest in controlling their own litigation. Rule 23(c)(2)(A) of the Alabama Rules of Civil Procedure provides an option for members of a class action certified under Rule 23(b)(3) to be excluded from the proceeding and thereby avoid being bound by a judgment against the class. Intervenor wish to and will exercise that option if the class is converted to a Rule 23(b)(3) class and they are found to be members of the class.

3. Separate litigation has already been commenced by many individuals who may be construed to be members of the class.

4. The Circuit Court of Barbour County is not a convenient forum for the Intervenor and is not the forum they would have chosen to litigate their claims against Liberty National.

5. Substantial difficulties are likely to arise in the management of the class action.

6. The representative party in the class action seeks predominately monetary relief in his amended complaint rather than injunctive and declaratory relief. Accordingly,

the class should be certified, if at all, under Rule 23(b)(3), not Rule 23(b)(2).

7. Forcing the Intervenor to litigate their claims under the class certified in the Circuit Court of Barbour County unconstitutionally denies the Intervenor the right to pursue their individual claims in the Circuit Court of Mobile County, Alabama.

**C.**

**In the alternative, Intervenor move the Court to vacate its order and decertify the class on the following grounds:**

1. The purported class is not so composed as to be appropriate for class action treatment.

2. The questions of law and fact are not common to the members of the purported class.

3. The claims or defenses of the representative party are not typical of the claims and defense of the purported class.

4. The representative party will not fairly and adequately protect the interests of the purported class.

5. The prosecution of separate actions by individual members of the purported class will not create a risk of inconsistent or varying adjudications with respect to individual members of the purported class that will establish incompatible standards of conduct for the party opposing the purported class.

6. The prosecution of separate actions by individual members of the purported class will not create a risk of



adjudications with respect to individual members of the class that will be dispositive of the interests of the other members not parties to the adjudications nor will it substantially impair or impede their ability to protect their interests.

7. A class action is not a superior method for the fair and efficient adjudication of the controversy.

8. The individual members in the class action have a strong interest in controlling their own litigation.

9. Separate litigation has already been commenced by many individuals who may be construed to be members of the class.

10. The Circuit Court of Barbour County is not a convenient forum for the Interventors and is not the forum they would have chosen to litigate their claims against Liberty National.

11. Substantial difficulties are likely to arise in the management of the class action.

12. Forcing the Intervenor to litigate their claims under the class certified in the Circuit Court of Barbour County unconstitutionally denies the Intervenor the right to pursue their individual claims in the Circuit Court of Mobile County, Alabama.

/s/ Bill Roedder  
William C. Roedder, Jr.  
 W. Alexander Moseley  
 Attorneys for  
 Intervenor

Of Counsel:

HAND, ARENDALL, BEDSOLE,  
 GREAVES & JOHNSTON  
 Post Office Box 123  
 Mobile, Alabama 36601  
 (205) 432-5511

#### CERTIFICATE OF SERVICE

I do hereby certify that I have, on this 10th day of June, 1993, served a copy of the foregoing pleading on counsel of record for all parties to this proceeding, by placing same in the United States mail, properly addressed and first class postage prepaid.

/s/ Bill Roedder

#### Counsel of Record:

Jere L. Beasley, Esq.  
 Beasley, Wilson, Allen,  
 Main & Crow, P.C.  
 Post Office Box 4160  
 Montgomery, AL 36103-4160

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 Steiner, Crum & Baker  
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James W. Gewin, Esq.  
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 1400 Park Place Tower  
 2001 Park Place  
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W. Boyd Reeves, Esq.  
 Norman E. Waldrop, Jr., Esq.  
 M. Kathleen Miller, Esq.  
 Armbrecht, Jackson, Demouy,  
 Crowe, Holmes & Reeves  
 Post Office Box 290  
 Mobile, AL 36601

---

IN THE CIRCUIT COURT FOR  
 BARBOUR COUNTY, ALABAMA  
 Clayton Division

CHARLIE FRANK ROBERTSON, *	
for himself, and in his *	
representative capacity for the *	Case Number:
class of persons described *	CV-92-021
herein, *	
	Oral Argument
Plaintiff, *	Requested
vs. *	BY M. Kathleen
	Miller
LIBERTY NATIONAL LIFE *	
INSURANCE COMPANY, *	
Defendant. *	

MOTION TO AMEND ORDER CERTIFYING CLASS

(Filed April 30, 1993)

Come now Intervenor Willard C. Griffith, Sara E. Griffith, Dawn R. Tubb, Edith E. Fellows, Edna F. Brock, Guy Adams, Alice S. Adams, Johnny L. Fellows, Floyd E. Nelson, Delores H. Nelson, Arnold F. Pitt and Almitta Pitt ("Intervenor"), and move the Court to amend its order certifying a class herein, which was entered on March 10, 1993, to add a provision to said order allowing Intervenor and other alleged members of the class certified by the Court to opt out of the class on the following grounds:

1. Intervenor have pending or potential suits against Liberty National in which they seek monetary damages against Liberty National for fraud and misrepresentation, among other causes of action, and Intervenor want to exercise their right to pursue their respective

suits for damages against Liberty National before a jury in the Circuit Court of Mobile County. A copy of a representative complaint filed by one of the Intervenor is attached hereto as Exhibit "A."

2. Intervenor is represented by Mobile counsel, W. Boyd Reeves, Norman E. Waldrop, Jr. and M. Kathleen Miller, Armbricht, Jackson, DeMouy, Crowe, Holmes & Reeves, Post Office Box 290, Mobile, Alabama 36601.

3. All of the Intervenor reside in Mobile County with the exception of Guy Adams and Alice S. Adams, who are former residents of Mobile County. A list of the respective addresses of the Intervenor, which also reflects the civil action numbers of their pending lawsuits, is attached hereto as Exhibit "B."

4. The insurance policies in question were marketed and delivered to Intervenor in Mobile County by Liberty National agents working in Mobile County.

5. Intervenor have named as individual defendants in certain of their pending suits present and/or former agents of Liberty National the majority of whom, upon information and belief, are residents of Mobile County.

6. Intervenor are seeking monetary damages as opposed to equitable and injunctive relief.

ARMBRECHT, JACKSON,  
DeMOUY, CROWE, HOLMES  
& REEVES  
Post Office Box 290  
Mobile, Alabama 36601  
(205) 432-6751

By: /s/ W. Boyd Reeves - MKM  
W. Boyd Reeves

By: /s/ Norman E. Waldrop, Jr. -  
MKM  
Norman E. Waldrop, Jr.

By: /s/ M. Kathleen Miller  
M. Kathleen Miller

#### CERTIFICATE OF SERVICE

I hereby certify that I have on this the 29th day of April, 1993 served a copy of the foregoing pleading on

Jere L. Beasley, Esq.  
Beasley, Wilson, Allen,  
Main & Crow, P.C.  
Post Office Box 4160  
Montgomery, AL 36103-4160

Walter R. Byars, Esq.  
Steiner, Crum & Baker  
Post Office Box 668  
Montgomery, AL 36101-0668

James W. Gewin, Esq.  
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by mailing the same by United States mail properly addressed and first class postage prepaid.

/s/ M. Kathleen Miller



**Defendants.**

[Exhibit A]

CIVIL ACTION  
NO.  
CV-93-001048  
DEMAND FOR  
JURY TRIAL

will be substituted by amendment when such information is ascertained. It is alleged that Liberty National is responsible for the actions of fictitious parties "D" through "I" under the doctrine of *respondeat superior*, agency, or other doctrines.

6. In the mid to late 1970s, Plaintiff first purchased a cancer policy from Liberty National. This policy provided certain benefits, including benefits for "radiation therapy and prescribed drugs and medicine used in the treatment of cancer".

7. At the time Plaintiff purchased said cancer policy, Defendants and Defendants' agents represented to the Plaintiff that said cancer policy would cover "100% of all of your cancer treatment". The original cancer policy issued to Plaintiff by Liberty National provided benefits which covered 100% of radiation and chemotherapy treatment, as well as 100% of drugs and medicines used in the treatment of cancer and administered outside of the hospital.

8. Liberty National issued a number of renewal policies to Plaintiff which renewed the coverage afforded by the original cancer policy purchased by Plaintiff. The renewal policies, including, but not limited to policy no. 2544941, afforded coverage for 100% of radiation and chemotherapy treatment, as well as 100% of drugs and medicine used in the treatment of cancer and administered outside the hospital.

9. On December 10, 1986, the Plaintiff was approached by Liberty National sales agent Steven E. Mitchell. Mitchell, in his capacity as an agent for Liberty National, represented to the Plaintiff that Liberty

National had "a new cancer policy" which provided "better benefits" than Plaintiff's existing policy. Mitchell further represented, with respect to the new cancer policy that "all of the benefits under the new policy are much better than the policy you have now."

10. During this meeting, Mitchell, in his capacity as Liberty National's agent, pointed out how certain benefits had been increased under Liberty National's new cancer policy and made reference to the first occurrence benefit which had been added. Mitchell failed to inform the Plaintiff that benefits relating to radiation and chemotherapy, as well as drugs and medicines administered outside of the hospital, were greatly reduced under the new policy.

11. On December 10, 1986, said representations of Liberty National's agent Steven E. Mitchell that all benefits relating to cancer treatment were "better" under the new policy were false and Defendants and Steven E. Mitchell knew they were false at the time said representations were made but made said representations with the intention that the Plaintiff would rely upon them.

12. On December 10, 1986, Plaintiff did indeed rely upon the statements, omissions, and promises made by the Defendants and agreed to pay an increased monthly premium so that Plaintiff could exchange her original cancer policy coverage for a new, allegedly better, cancer policy issued by Liberty National and numbered 27547394. Each monthly payment subsequent to this date constitutes a separate and distinct act of fraud on the part of the Defendants and materially injured and damaged the Plaintiff. Each monthly payment was paid by Plaintiff



in direct reliance upon the false representations, statements, omissions or promises made by said Defendants.

13. Plaintiff only recently discovered the fraudulent conduct of Defendants and the misrepresentations made by the Defendants, including those made by Steven E. Mitchell.

14. Defendants seized upon Plaintiff's lack of knowledge and lack of sophistication in insurance matters as an opportunity to issue new insurance to the Plaintiff which reduced the coverage afforded to Plaintiff and which Plaintiff would not otherwise have purchased without her knowledge and consent.

15. Plaintiff alleges that, in connection with the fraudulent conduct on the part of the Defendants, said Defendants, severally and separately, consciously or deliberately engaged in oppression, fraud, wantonness or malice with regard to the Plaintiff.

16. Defendants are guilty of conduct evincing a pattern or practice of intentional wrongful conduct with respect to said cancer policies.

17. Defendants, Liberty National Life Insurance Corporation, Torchmark Corporation, and "A" through "I", with respect to their respective agents, employees and servants, either:

- a. Knew or should have known of the unfitness of the agents, employees or servants and employed them or continued to employ them, or used their services without proper instruction and with disregard of the rights or financial safety and security of the Plaintiff; and/or

- b. Authorized the wrongful conduct; and/or
- c. Ratified the wrongful conduct; and/or
- d. The acts of said agents, servants or employees were calculated to or did benefit said Defendants without the knowledge or participation of the Plaintiff.

18. As a proximate consequence and result of the fraudulent acts of Defendants, the Plaintiff was injured and damaged in that Plaintiff was made to give up her original cancer policy which provided 100% coverage for radiation and chemotherapy treatment, as well as for drugs and medicines administered outside of the hospital. The Plaintiff has also been injured and damaged as a result of having to pay a greater sum in the form of premiums for coverage which provides greatly reduced benefits. Plaintiff has also incurred great mental pain and anguish and continues to so suffer.

#### **FIRST CAUSE OF ACTION** **(Fraud)**

19. Plaintiff adopts and re-alleges paragraphs 1 through 18 as if fully set out herein.

20. Defendants' fraudulent acts constituted intentional misrepresentation, deceit and/or concealment of material facts which Defendants had a duty to disclose to Plaintiff. Defendants' conduct was gross, oppressive and/or malicious and was committed with the intention on the part of the Defendants of thereby depriving Plaintiff of property or legal rights or otherwise causing injury to Plaintiff.



WHEREFORE, Plaintiff demands judgment against Defendants, Liberty National Life Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I", jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**SECOND CAUSE OF ACTION**  
**(Misrepresentation)**

21. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

22. The alleged misrepresentations made by the Defendants, including those made by Steven E. Mitchell, were made either willfully to deceive, or recklessly without knowledge, and were acted on by Plaintiff within the meaning of § 6-5-101, Code of Alabama (1975).

WHEREFORE, Plaintiff demands judgment against Defendants, Liberty National Life Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I," jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**THIRD CAUSE OF ACTION**  
**(Suppression)**

23. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

24. Defendants suppressed material facts which Defendants were obligated to communicate to Plaintiff within the meaning of § 6-5-102, Code of Alabama (1975).

WHEREFORE, Plaintiff demands judgment against Defendants Liberty National Life Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I," jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**FOURTH CAUSE OF ACTION**  
**(Deceit)**

25. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

26. The misrepresentations made by the Defendants, including those made by Steven E. Mitchell, were made willfully to induce Plaintiff to act and Plaintiff acted upon said willful misrepresentations to her injury within the meaning of § 6-5-103, Code of Alabama (1975).

27. Said misrepresentations were made with the knowledge that they were false or, alternatively, were made fraudulently or recklessly with the intention to deceive.

WHEREFORE, Plaintiff demands judgment against Defendants, Liberty National Life Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I," jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**FIFTH CAUSE OF ACTION**  
**(Fraudulent Deceit)**

28. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

29. Defendants willfully deceived Plaintiff with the intent to induce them to alter her position to her injury within the meaning of § 6-5-104, Code of Alabama (1975).

WHEREFORE, Plaintiff demands judgment against Defendants, Liberty National Life Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I," jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**SIXTH CAUSE OF ACTION**  
**(Twisting)**

30. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

31. Defendants' misrepresentations constitute misleading, incomplete comparisons as to the terms, conditions or benefits contained in said cancer policy and were made for the purpose of inducing, or attempting or tending to induce, Plaintiff to exchange or convert her existing insurance policy in violation of § 27-12-6, Code of Alabama (1975).

WHEREFORE, Plaintiff demands judgment against Defendants, Liberty National Life Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I," jointly and severally, for compensatory and

punitive damages together with interest and costs of this action.

**SEVENTH CAUSE OF ACTION**  
**(Negligence)**

32. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

33. The acts of the Defendants were negligent in that Defendants deliberately omitted and/or failed to disclose to the Plaintiff the following facts:

- a. The benefits provided in her original cancer policy were being greatly reduced by issuing the new policy;
- b. The Plaintiff's premiums were being increased while her benefits were being reduced.

34. Further, the acts of the Defendants were negligent because the Defendants knew that the cancellation of Plaintiff's original cancer policy and issuance of the replacement policy was without any reasonable or arguable justification, and Defendants' actions were done with the knowledge that harm to the Plaintiff was likely to result from the cancellation of her original cancer insurance policy.

WHEREFORE, Plaintiff demands judgment against all Defendants, Liberty National Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I", jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**EIGHTH CAUSE OF ACTION**  
**(Wantonness)**

35. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

36. The acts of the Defendants were wanton in that Defendants deliberately omitted and/or failed to disclose to the Plaintiff the following facts:

- a. The benefits provided in her original cancer policy were being greatly reduced by issuing the new policy;
- b. The Plaintiff's premiums were being increased while their benefits were being reduced.

37. Further, the acts of the Defendants were wanton because Defendants knew that the cancellation of Plaintiff's original cancer policy and issuance of the replacement policy was without any reasonable or arguable justification.

38. Defendants acted recklessly and/or with a conscious disregard for the rights of the Plaintiff when they issued said replacement policy and said replacement was done with the knowledge that harm to the Plaintiff was likely to result from the cancellation of Plaintiff's original cancer insurance policy.

WHEREFORE, Plaintiff demands judgment against all Defendants, Liberty National Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I", jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**NINTH CAUSE OF ACTION**  
**(Malice)**

39. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

40. The acts of the Defendants were malicious in that Defendants deliberately omitted and/or failed to disclose to the Plaintiff the following facts:

- a. The benefits provided in her original cancer policy were being greatly reduced by issuing the new policy;
- b. The Plaintiff's premiums were being increased while her benefits were being reduced.

41. The acts of the Defendants were malicious because the Defendants knew that the cancellation of Plaintiff's original cancer policy and issuance of the replacement policy was without any reasonable or arguable justification.

42. Defendants' actions were intentional and wrongful and were done without just cause or excuse, with an intent to injure Plaintiff.

WHEREFORE, Plaintiff demands judgment against all Defendants, Liberty National Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I", jointly and severally, for compensatory and punitive damages together with interest and costs of this action.



**TENTH CAUSE OF ACTION**  
**(Oppression)**

43. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

44. The acts of the Defendants were oppressive in that Defendants deliberately omitted and/or failed to disclose to the Plaintiff the following facts:

- a. The benefits provided in her original cancer policy were being greatly reduced by issuing the new policy;
- b. The Plaintiff premiums were being increased while her benefits were being reduced.

45. Further, the acts of the Defendants were oppressive because they subjected the Plaintiff to cruel and unjust hardship in conscious disregard of the rights of the Plaintiff.

WHEREFORE, Plaintiff demands judgment against all Defendants, Liberty National Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I", jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**ELEVENTH CAUSE OF ACTION**  
**(Conspiracy)**

46. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

47. The actions of Defendants are part of a preconceived plan, design or conspiracy conceived through Liberty National headquarters and executed through its

regional and local offices whereby Liberty National devised a scheme to trick or otherwise mislead the Plaintiff and other insureds in order to sell their products, to generate higher fees and commissions throughout its agency organizational structure and to reduce its claims exposure by reducing benefits without Plaintiff's knowledge or authorization, and agents were trained in team meetings and sales meetings to do the following:

- a. Change name on policies;
- b. Switch policies from the name of one spouse to the other;
- c. Use overages to save lapses;
- d. Use fraudulent addresses to prevent insureds from receiving information on fraudulent transactions.

WHEREFORE, Plaintiff demands judgment against all Defendants, Liberty National Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I", jointly and severally, for compensatory and punitive damages together with interest and costs of this action.

**TWELFTH CAUSE OF ACTION**  
**(Breach of Contract)**

48. Plaintiff adopts and re-alleges paragraphs 1 through 18 above as if fully set out herein.

49. In the mid to late 1970s, Liberty National entered into a contract of insurance with Plaintiff. The contract was written by Liberty National and Liberty

National had total control and discretion as to the language used in said contract.

50. The contract of insurance contained the following provision:

" . . . We do not reserve the right to restrict or limit this policy in any other way while it is in force."

This provision expressly limits Liberty National's right to change or restrict the contract of insurance in any way other than change in premium rates.

51. The actions of Liberty National, by and through their agents, whereby her original cancer policy was cancelled and replaced with a policy providing greatly reduced benefits at a higher cost, constitutes a breach of the contract of insurance under which Plaintiff is the beneficiary.

52. As a proximate consequence and result of the breach of contract by Defendants, Plaintiff was injured and damaged in that the Plaintiff lost the value of her original policy from the time of its conversion to a policy for lesser benefits. Plaintiff has also incurred great mental pain and anguish and continues to so suffer.

WHEREFORE, Plaintiff demands judgment against all Defendants, Liberty National Life Insurance Company, Torchmark Corporation, Steven E. Mitchell and "A" through "I", jointly and severally, for compensatory and

punitive damages together with interest and costs of this action.

ARMBRECHT, JACKSON,  
DeMOUY, CROWE, HOLMES  
& REEVES

Post Office Box 290  
Mobile, Alabama 36601  
(205) 432-6751

By: /s/ W. Boyd Reeves  
W. Boyd Reeves

By: /s/ Norman E. Waldrop, Jr.  
(wbr)  
Norman E. Waldrop, Jr.

By: /s/ M. Kathleen Miller (wbr)  
M. Kathleen Miller

PLEASE SERVE ALL DEFENDANTS BY CERTIFIED  
MAIL AS FOLLOWS:

Liberty National Life Insurance Company  
The Corporation Company  
60 Commerce Street  
Montgomery, Alabama 36103

Torchmark Corporation  
The Corporation Company  
60 Commerce Street  
Montgomery, Alabama 36103

Steven E. Mitchell  
Liberty National Life Insurance Company  
1361 Springhill Avenue  
Mobile, Alabama 36604

Willard C. Griffith, Sara E. Griffith and Dawn R. Tubb 4613 Dauphin Island Parkway Mobile, Alabama 36605	CV-93-001046
Edith E. Fellows 3361 Mildred Street Mobile, Alabama 36605	CV-93-001047
Edna F. Brock 3361 Mildred Street Mobile, Alabama 36605	CV-93-001048
Arnold F. Pitt and Almitta Pitt 3604 York Road Mobile, Alabama 36605	CV-93-001049
Johnny L. Fellows 2455 Robin Hood Drive Mobile, Alabama 36605	CV-93-001050
Guy Adams and Alice S. Adams 31330 Busbee Road Spanish Fort, Alabama 36527	CV-93-001051
Floyd E. Nelson and Delores H. Nelson 9530 I-10 Service Road Irvington, Alabama 36544	CV-93-001052

Exhibit "B"

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**IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division**

CHARLIE FRANK ROBERTSON,	*	
for himself, and in his	*	
representative capacity for the	*	
class of persons described herein,	*	
	*	
Plaintiff,	*	Case Number:
vs.	*	CV-92-021
	*	
LIBERTY NATIONAL LIFE	*	
INSURANCE COMPANY,	*	
	*	
Defendant.	*	

**STIPULATION AND AGREEMENT OF  
COMPROMISE AND SETTLEMENT**

(Filed June 16, 1993)

The parties to the above-captioned civil action (the "Litigation"), Charlie Frank Robertson, for himself ("Named Plaintiff") and as Class Representative, and Liberty National Life Insurance Company ("Defendant"), for itself and both by and through their respective attorneys, have entered into the following Stipulation and Agreement of Compromise and Settlement (the "Stipulation" or the "Settlement") **subject to the approval of the Court.**

**DEFINITIONS**

The following words or phrases, whenever they appear in this Agreement, shall have the following meaning ascribed to them, and the singular includes the plural, and the plural the singular:



1. "Old Policy" and "Old Cancer Policy" shall mean any cancer insurance policy or policies issued by Liberty National Life Insurance Company ("Liberty National") which (i) contained no monetary limits or exclusions regarding benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, and (ii) which was issued prior to August 29, 1986.

2. "New Policy" and "New Cancer Policy" shall mean any cancer insurance policy or policies issued by Liberty National on or after August 29, 1986 which contained monetary limits upon or exclusions of benefits for otherwise covered radiation, chemotherapy, and prescription chemotherapy drugs and provided no benefits or coverage for other out-of-hospital prescription drugs.

3. "Class" shall mean the Class certified by the Barbour County Circuit Court on March 10, 1993 as set forth in recital 11 below and as more fully defined in Section I below.

4. "Named Insured" or "policyholder" shall mean the person listed as "insured" on the face of the policy, and to whom benefits under the policy for the treatment of persons covered under the policy are payable by the terms of the policy.

5. "Covered Persons" shall mean dependents of Named Insured who are covered persons within the meaning of the applicable policy.

6. "Other out-of-hospital prescription drugs" or "other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer" shall mean all

prescription drugs, other than prescription chemotherapy drugs, prescribed for any named insured or covered person with a diagnosis of cancer for use outside of a hospital in the (i) treatment of cancer, or (ii) treatment of the effects of cancer or of cancer treatment.

### RECITALS

1. Liberty National is an insurance company which offers, in addition to other insurance products, policies of insurance providing benefits to policyholders and insureds who are diagnosed with cancer.

2. Liberty National had in force, prior to August 29, 1986, certain old cancer policies which, among other benefits, provided benefits payable without monetary limits to named insureds for themselves and other covered persons under the policy for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs.

3. It is alleged in this action that beginning on or about August 29, 1986, and on other occasions thereafter, Liberty National instituted a program or programs to offer those customers having the old cancer policies the opportunity to replace their old cancer policies then in effect with one of several new cancer policies which contained monetary limits for otherwise covered radiation, chemotherapy and prescription chemotherapy drugs, and eliminated the benefit for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer (the "alleged cancer policy exchange programs").

4. The new policies also provided certain new or enhanced benefits not provided by the old policy including, but not limited to, the following new benefits under one or more of the "new policy" forms: a "first occurrence" cash benefit payable to the named insured for each insured upon initial diagnosis of cancer; dread disease benefits; hospice benefits; benefits for prostheses; experimental treatment benefits; disability income benefits; and other new or enhanced benefits.

5. As of August 29, 1986, Liberty National discontinued the sale of old policies. Old policies issued prior to that date remained in force for those who already had such policies, but chose not to replace the old policy with the new policy, and continued to pay premiums on the old policy as and when due.

6. Under all old policies and new policies, all benefits payable for the treatment rendered to the named insured or any covered person are payable to the named insured under the policy, or to his assignee.

7. Charlie Frank Robertson ("Robertson"), prior to August 29, 1986, had purchased from Liberty National one of the old cancer policies described in recital 2 above, and was the named insured under said policy. After August 29, 1986, Robertson terminated his old policy and purchased one of the new policies to replace his old policy. Robertson was also the named insured under the new policy. Robertson has not been diagnosed with cancer and has made no claim for benefits under the new policy.

8. Robertson, on behalf of himself and the Class, contends that in the course of implementing the alleged

cancer policy exchange programs, Liberty National misrepresented or failed to disclose material facts and, in particular, misrepresented the benefits afforded by the new policy and specifically failed to disclose the monetary limits imposed by the new policy upon benefits for radiation, chemotherapy and prescription chemotherapy drugs and the elimination of coverage for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer, and failed to adequately inform policyholders that such coverages were provided without such monetary limits or exclusions (under their old policies).

9. Liberty National vigorously denies the allegations and contends that the new policies provided substantially greater overall coverage than the old policies and that the new policies have paid substantially greater sums in overall benefits to a large majority of those who later were diagnosed with cancer.

10. Robertson filed suit on or about May 12, 1992, against Liberty National initially asserting claims arising from a life insurance policy issued by Liberty National. All claims arising out of or related to the life insurance policy have heretofore been settled in a separate agreement between Robertson and Liberty National which has no bearing on this settlement agreement.

11. On or about October 2, 1992, Robertson (the "Named Plaintiff" and the "Class Representative"), amended his complaint (against Liberty National) to assert on behalf of himself and a purported Class claims arising out of the alleged cancer policy exchange programs.



12. On March 10, 1993, over Liberty National's objection, the Circuit Court of Barbour County (the "Circuit Court" or the "Court") entered a class action certification order pursuant to Rule 23(b)(2), *Alabama Rules of Civil Procedure*, certifying a class consisting of:

"All past and present insureds under cancer policies issued by Liberty National Life Insurance Company ("Liberty National") providing unlimited coverage for radiation, chemotherapy and out-of-hospital prescription drugs ("old policy"), which coverage was effective on or after August 29, 1986, the date that Liberty National offered new replacement cancer policies limiting coverage for radiation, chemotherapy and out-of-hospital prescription drugs ("new policy"), excluding from the certified class any insured, who, on or before the date of this class certification order, has filed a separate action against Liberty National asserting claims arising out of the cancer policies o[r] coverage."

In its Order of March 10, 1993, the Circuit Court reserved the right to modify, clarify, amend or refine the class certification and the definition of the Class.

13. The parties to this Class Action and Litigation thereafter negotiated and now desire to enter into this Agreement to resolve all claims arising out of or related to the alleged cancer policy exchange programs or related to the Released Claims (as defined in Section III below) which have been asserted or could be asserted by or on behalf of the Class or any Class Members on the terms and conditions set forth in this Agreement. The intent and purpose of this Agreement is to effect a fair and reasonable full and final settlement of all actions, claims,

demands, causes of action, and liabilities which may have heretofore been, or may hereafter be, asserted by or on behalf of any person or persons described in said Class arising from or related to the alleged cancer policy exchange programs or to the Released Claims as defined in Section III below.

14. After substantial discovery and after due inquiry deemed by them to be sufficient, counsel for Named Plaintiff and the Class have concluded that a settlement of this Litigation upon the terms and conditions hereof would be in the best interests of the Class considering the totality of the circumstances, including but not limited to the substantial benefits afforded by the settlement to all Class Members; the risks, uncertainty and expense of litigation; the substantial defenses which have been and could be asserted by defendant Liberty National, including but not limited to statutes of limitation defenses (the applicability and merit of such defenses not being conceded by Named Plaintiff, Class Representative, or Class Counsel); the primary need for reformation of the new policies and for other equitable relief for the Class in order to ensure that all Class Members with new policies currently in force and all Class Members who lapsed their old policies after August 29, 1986, (and did not reinstate the old policy) are given the opportunity to maintain coverage against future cancer claims for radiation, chemotherapy, prescription chemotherapy drugs, and for other out-of-hospital prescription drugs all without monetary limits, while at the same time achieving restitution of any past benefits which Class Members may have enjoyed but for the



matters alleged in the complaint; and the other substantial benefits available under the settlement.

15. Liberty National denies all liability with respect to any and all claims alleged in the Litigation or described in this Stipulation, but has entered into this Stipulation so as to: (1) avoid the substantial expense, inconvenience, distraction, uncertainty, and adverse publicity associated with continued litigation; (2) avoid the risks of the Litigation; (3) provide coverage without monetary limits for radiation, chemotherapy, prescription chemotherapy drugs and other out-of-hospital prescription drugs to Class Members under the new cancer policies and thereby preserve the goodwill and loyalty of Liberty National's customers; (4) avoid the burdens of multiple and piecemeal litigation of substantially similar allegations in separate lawsuits in different courts; and (5) eliminate any possibility that any of its Class Members were or could be prejudiced by virtue of having replaced an old policy with a new policy.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and conditions herein, and the mutual undertakings of the parties hereto, it is hereby stipulated and agreed, by and among the Named Plaintiff, Class Representative, and Class Counsel on behalf of the Class, and the Defendant Liberty National and its Counsel, that the Litigation should be settled and compromised, subject to approval of the Circuit Court of Barbour County, Alabama, pursuant to Rule 23 of the Alabama Rules of Civil Procedure, according to the following terms and conditions:

## THE TERMS OF THE SETTLEMENT

### I. Class Action for Settlement Purposes.

The parties agree, solely for the purpose of settlement, that the Litigation shall continue to be maintained as a class action pursuant to Alabama Rule of Civil Procedure ("ARCP") 23(b)(2), but if the Settlement is not approved or otherwise is not consummated, then the Parties retain all rights to oppose continued class action treatment, or to seek decertification of the Class.

The parties stipulate, subject to Court approval, that the Class shall consist of: all persons who now or in the past were insured under any cancer policy which (1) was issued by Liberty National Life Insurance Company ("Liberty National") on or before August 29, 1986, and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; *provided, however*, that (i) any insured who is or was a named plaintiff in any separate lawsuit which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the Class *unless* such lawsuit has been voluntarily dismissed without prejudice on or before the date this settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any

insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the Class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the Class.

## II. Benefits From and Conditions of Settlement.

1. Settlement of Pending and Potential Actions. All actions, claims, demands, causes of actions, and liabilities which are asserted or which could be asserted by or on behalf of any Class Member in this Litigation relating to the alleged cancer policy exchange programs or the Released Claims (as defined in Section III below) shall be resolved on the terms and conditions hereinafter provided.

2. Settlement Recommended by Class Counsel. Class Counsel cannot bind the Class Members to the terms of this settlement without court approval, but Class Counsel and each of them shall recommend the settlement for approval and enforcement by the Court and shall support the fairness, adequacy, and binding effect of the settlement as to each Class Member in the event of any appeal or other challenge thereto.

3. Court Approval. All the transactions and undertakings herein are subject to approval by the Court and entry of a final judgment in accordance with Rule 54(b) of the Alabama Rules of Civil Procedure substantially in the form of the proposed order attached as Exhibit D, which: (i) approves the final certification of the Class described

in Section I above; (ii) enters a final injunction and other declaratory and equitable relief permanently enjoining and requiring Liberty National to perform its obligations (including reformation of the new policies, ancillary restitution and the ancillary monetary relief) set forth in this Settlement Agreement (the "Injunction"), and subject to said Injunction and the right to enforcement thereof pursuant to the continuing jurisdiction reserved by the Court, approves the release of and dismisses with prejudice all claims asserted or which could have been asserted in this Litigation by or on behalf of the Class Members or any of them relating to the alleged cancer policy exchange programs or to the Released Claims as defined in Section III below; (iii) bars and enjoins each and all Class Members from filing, pursuing, continuing, or participating as a litigant in any separate individual lawsuit or separate class action relating to the alleged cancer exchange programs or the Released Claims (as defined in Section III below); (iv) ratifies the terms of the escrow agreement attached hereto as Exhibit E, (v) establishes an administrative procedure for consideration of claims to be submitted by Class Members pursuant to paragraph II-11 of this agreement and approves the proof of claim form attached hereto as Exhibit C; (vi) designates a bar date on or before which proofs of claims shall be submitted as designated in the administrative procedure; and (vii) reserves jurisdiction over all matters related to the administration, consummation, interpretation, and enforcement of the Stipulation and Settlement. This settlement is further conditioned on final affirmance and approval by each appellate court, in which any appeal or other petition for review is filed, of all aspects of this



settlement and the circuit court's Final Judgment and other orders contemplated hereby, if any appeal is taken from any such orders or judgments.

4. Cash Payments to Be Made in Escrow. Subject to the provisions of paragraph II-3, all fixed dollar settlement funds and the maximum amount of attorneys' fees which may be awarded by the Court will be paid by Liberty National to an independent escrow agent approved by the Court and placed in escrow within three (3) working days after preliminary approval of this Settlement Agreement by the Circuit Court. All fixed dollar settlement funds shall bear simple interest at twelve percent (12%) per annum from the date of the Circuit Court's preliminary approval until the date the funds are paid into escrow by Liberty National. In the event (i) any aspect of the settlement agreement is rejected by the Circuit Court or approval of the settlement agreement by the Circuit Court is reversed, vacated, or modified on appeal, or (ii) an order precluding, barring, and enjoining separate actions by Class Members relating to the alleged cancer policy exchange programs or any of the Released Claims (as defined in Section III below) is not entered by the Circuit Court, or, if entered, is reversed, modified, or vacated in any respect on appeal; or (iii) any order is entered by the Alabama Supreme Court in any action now pending in any forum to which Liberty National is a party which permits the maintenance of separate individual or class actions asserting any Released Claims (as defined in Section III below) despite this settlement, then the escrowed settlement funds, attorneys' fees, and all accrued interest shall be returned from the escrow account to Liberty National. In the event the principal

amount of attorneys' fees provided for in paragraph II-19 is less than the amount escrowed, the excess shall be returned from the escrow account to Liberty National. If this Settlement Agreement is approved by the Circuit Court and a Final Order and Judgment barring separate individual or class claims is entered by said court, and if such approval, order and judgment are affirmed finally and in their entirety in the event of any appeal, the escrowed settlement funds and the escrowed attorneys' fees (or such portion of the attorneys' fees if less is approved by the Circuit Court and affirmed in the event of appeals), and all accrued interest or investment proceeds ("interest") will be paid as the Court may direct thereafter to the Class Members and Class Counsel, with interest to be paid to the parties to whom the settlement funds and the attorneys' fees funds are disbursed, i.e. with interest on the escrowed settlement funds distributed to the Class Members receiving the principal amount of the settlement funds; and with interest on the funds escrowed for attorneys' fees to be apportioned and distributed on the basis of the principal amounts to be distributed to Class Counsel and/or returned, if any, to Liberty National, all as provided in the written Escrow Agreement attached as Exhibit E.

5. Class Members Insured Under Old Policies Which Lapsed After August 29, 1986 May Reinstate Policies. Pursuant to the Injunction to be entered by the Circuit Court against Liberty National, Class Members who were named insureds under an old cancer policy in effect as of August 29, 1986 which was originally issued by Liberty National and which provided for benefits without monetary limits for radiation, chemotherapy,



prescription chemotherapy drugs and/or other out-of-hospital prescription drugs, and whose old policy lapsed after August 29, 1986 (but was not replaced within 30 days by a new policy), shall have the option to reinstate his/her old policy, on a prospective basis only, without regard to insurability, at the current 1993 premium rate based on such Class Member's age on the date the old policy was originally issued. Provided, however, if the old policy terminated solely because the Class Member attained the termination age under the old policy, then the Class Member is not eligible for a reinstated policy under this paragraph. Current 1993 premium rates will not be increased prior to January 1, 1995 (as provided in paragraph II-8). Premiums will be charged on a prospective basis only, and coverage will be on a prospective basis only. This option may be exercised by delivering a written request for reinstatement to: Thomas E. Hamby, Vice President, Liberty National Life Insurance Company, P.O. Box 2612, Birmingham, Alabama 35202. This option will expire if not exercised on or before January 1, 1995. If the option is exercised, reinstatement shall be effective only upon final approval of the Settlement (and final binding affirmance in the event of an appeal) and upon receipt of the applicable premium. Liberty National shall be enjoined to reinstate the policy of any Class Member who requests and qualifies for reinstatement under this paragraph. Any such reinstatement shall result in the cancellation of any new policy of such Class Member purchased while the Class Member was in lapsed status as to the old policy, and its replacement by the reinstated old policy on the terms provided in this paragraph. No one shall be construed by this agreement to qualify to

own two (2) policies concurrently. Upon the lapse for non-payment of premiums or cancellation by the Named Insured of any policy reinstated under this paragraph, Liberty National shall have no further obligation under this Settlement as to the lapsed policy or persons insured thereunder.

6. Class Members Insured Under New Policy to Receive Waiver of Limits on Benefits. Pursuant to an Injunction to be entered against Liberty National, Class Members who contemporaneously switched from an old policy to the new policy (and Class Members who lapsed the old policy, but bought a new policy within thirty days of that lapse and those Class Members who originally contemporaneously switched from an old policy to a new policy but subsequently switched from one new policy to another new policy) will receive reformation of their new policies (if such new policy is currently in force) so as to provide prospective coverage for the named insured and covered persons under the new policy without monetary limits (with an automatic waiver or removal of any and all "caps" or monetary limits) for otherwise covered radiation, chemotherapy, and prescription chemotherapy drugs, and receive prospective coverage without monetary limits (with an automatic waiver or removal of any exclusion) for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer. These prospective coverages shall apply to any claim for any expense incurred after the date of final approval (or final binding affirmance in the event of appeal) of this Agreement. All other provisions, terms, and conditions of the policy shall remain unchanged. (Benefit claims of Class Members under new policies accrued prior to the

date of this agreement are addressed by the restitution fund provided in paragraph II-10 and the ancillary settlement funds created in paragraphs II-9 and II-12 of this Agreement.) Class Members currently owning new policies and who are eligible for reformation under this paragraph shall be charged no additional premium for this additional coverage or waiver, provided, however, that claims paid under this additional coverage or waiver may be considered as claims experience for the purpose of future premium adjustments, subject to the provisions of paragraph II-8 of this Agreement. With respect to Class Members with new policies currently in force and who are eligible for reformation under this paragraph, Liberty National shall be enjoined from applying or enforcing any exclusion of benefits for out-of-hospital prescription drugs prescribed in connection with the treatment of cancer, and shall be enjoined from applying or enforcing any monetary limits or caps upon benefits for radiation, chemotherapy, or prescription chemotherapy drugs which is contained in any new policy currently owned by such Class Member; provided, however, that nothing herein shall prohibit Liberty National from continuing to enforce or apply such monetary limits or caps or exclusions with respect to policies owned by persons who are not Class Members or who are not eligible for reformation under this paragraph. The provisions of this paragraph II-6 shall apply only to new policies of said Class Members which are in force as of the date this Settlement Agreement is executed and shall apply to said policies only so long as they are kept in force and all premiums are paid (or after any reinstatement permitted under the terms of the policy upon full payment of all delinquent

premiums). In the event of any appeal from a Final Order of the Circuit Court approving this Settlement, the Injunction contemplated by this paragraph shall take effect upon final binding affirmance of said appeal.

7. Pooling of Class Members for Rate Making Purposes. For purposes of future premium rate filings, Liberty National will "pool" the experience of all Class Members in all states in which these policies were approved for issuance unless specifically disapproved by the insurance department of one or more of the states. After preliminary approval of the Settlement, Liberty National will file all future premium rates based on the "pooled" claims and premiums experience of all Class Members in all states in which these old and new cancer policies were approved for issuance, and the Court will enter an Order enjoining Liberty National to use its best efforts to obtain acceptance from all state insurance departments to allow Liberty National to "pool" the experience of all Class Members for rate making purposes. In the event the insurance department of one or more of the states disapproves "pooled" rate filing in that state, Liberty National will "pool" the experience of all Class Members in all remaining states. This settlement is not conditioned on approval of pooling of Class Members by any or all insurance departments in the states in which these policies were approved for issuance. This provision does not require Liberty National to pool policyholders or insureds who are not members of the Class with Class Members. The obligations of this paragraph shall expire if this Settlement is not approved by the Circuit Court or if such approval is reversed, vacated, or modified on appeal or other petition for review.



8. Premiums Not Increased From Current Rates.

Pursuant to the Settlement, an Injunction will be entered against Liberty National prohibiting Liberty National from increasing premiums for any old policies of Class Members currently in force and for any new policies of Class Members currently in force prior to January 1, 1995. Thereafter, the percentage of any premium rate increase for old policies of Class Members shall not exceed the percentage of premium rate increases for new policies of Class Members. The requirements of this paragraph do not apply with respect to persons who are not Class Members.

9. Incidental Monetary Settlement Fund for Class Members Who Submitted Certain Cancer Claims Under New Policies. Pursuant to the Injunction to be entered against Liberty National and ancillary to the equitable relief ordered by the Court, the trial court will order Liberty National to pay to the escrow agent the sum of one million dollars (\$1,000,000.00), subject to the terms and conditions of this settlement and the terms and conditions of the escrow agreement attached hereto as Exhibit E. All Class Members who return true and proper proof of claim forms (Exhibit C) as described in paragraphs II-10 and II-11 and who were named insureds on new policies pursuant to which benefit claims were submitted for radiation, chemotherapy or prescription chemotherapy drugs, or for whom expenses were incurred for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer administered to any covered person under the policy will share per capita

in this fund. With respect to other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer, Class Members who submit a true and proper proof of claim form (Exhibit C), and who otherwise qualify under this paragraph, shall be entitled to share per capita in this fund if he/she incurred expenses for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer to any covered person under the Class Member's new policy which was in effect at the time the expenses were incurred. Within ninety (90) days of the deadline for submission of proof of claim forms provided in paragraph II-11, or within thirty (30) days of final binding affirmance of approval of this Settlement in the event of an appeal, whichever last occurs, Liberty National shall file with the Clerk and the Special Master a list setting forth the names and last known addresses of each Class Member shown by Liberty National records to be qualified to share in this fund. A check in the amount of each qualified Class Member's per capita share of this fund will be sent by the Escrow Agent (at Liberty National's expense) to the last known address of each such Class Member. Such check shall be mailed at the same time and in the same manner as set forth in paragraph II-11 below.

10. Liberty National to Provide Full Restitution of Certain Benefits to Class Members Who Have Submitted Certain Benefit Claims Under the New Policy. Pursuant to the Injunction to be entered against Liberty National, and ancillary to the equitable relief ordered by the Court, any Class Member who was a named insured under a new policy when a claim for cancer benefits under that new



policy was heretofore submitted for radiation, chemotherapy, or prescription chemotherapy drugs which exceeded the monetary limits for these coverages under said new policy, or whose expenses included any other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer shall have the right to submit a proof of claim on the form attached as Exhibit C, with supporting documentation. If, after considering all benefits paid to (or to the assignee of) each such Class Member under the new policy (including but not limited to all benefits which would not have been afforded by the Class Member's old policy), the claimant Class Member has still received fewer dollars than he/she would have received for all benefits (including "hospital admission" benefits and all other benefits under the old policy) had the Class Member's old policy remained in force and all other benefits under the old policy, then Liberty National shall, pursuant to the Injunction contemplated hereby, make restitution of one hundred percent (100%) of the difference to the named insured under the new policy which was in force at the time of the pertinent treatment. To the extent each claiming Class Member qualifies for payment under this paragraph, he/she shall be paid the amount due hereunder without regard to any defense of the statute of limitations which could have been asserted by Liberty National had this case gone to trial. Only Class Members who were named insureds on the new policy which was in force at the time the treatment was rendered and who submit true and proper proof of claim forms with supporting documentation and who are otherwise eligible for payments under the terms of this paragraph ("Qualified Claims"), will be entitled to the

benefits of this paragraph. Copies of legitimate bills or invoices from medical providers will be considered adequate documentation, subject to Liberty National's right to contest the accuracy or validity of the claim. Upon written request by or on behalf of a claimant, Liberty National will use reasonable good faith efforts to assist in locating and providing any information reasonably available within its files or data processing records concerning the identity of providers and dates of service for any such claimant. Nothing in this paragraph shall require Liberty National to pay for any expense it has already actually paid, or to make duplicate payments for the same item of expense.

11. Administrative Procedure for Claims. The Court shall appoint a Special Master to review all claims and disputes which may arise with respect to proofs of claim made pursuant to paragraph II-10. The Special Master shall have no authority to alter or modify the terms of this Agreement. The Special Master shall not be a past or present employee or expert of or for any of the parties hereto or their counsel. The proof of claim form referenced in paragraph II-10 is attached hereto as Exhibit C. The proof of claim form shall be mailed at the same time and to the same persons as provided with respect to the Notice described in paragraph II-17 below. The proof of claim form shall require all claims to be submitted to the Special Master within 120 days of mailing. Within seven (7) days of receipt of each proof of claim form, the Special Master shall (i) submit one copy of each proof of claim form received to counsel for Liberty National, (ii) submit one copy of each proof of claim form received to Class Counsel; and (iii) file the original proof of claim form

with the Court. No later than ninety (90) days after said deadline for submission of proof of claim forms by Class Members, or thirty (30) days after final binding affirmance of this Settlement in the event of appeal, whichever last occurs, Liberty National shall submit to the Special Master a list of all proofs of claim, together with a statement of the amount (if any) calculated by Liberty National to be due each claimant as restitution under this paragraph. Within thirty (30) days following the expiration of the time for appeal, or following final binding affirmance of the Circuit Court, each claimant Class Member will then be notified in writing by the Special Master (at Liberty National's expense) of the preliminary disposition of his claim by Liberty National and will be notified that the Class Member can then obtain a special hearing of his claim by the Special Master by requesting such a hearing in writing addressed to Class Counsel, and that such request must be submitted within thirty (30) days. Class Members submitting a timely written request for hearing shall be notified in writing of the hearing date and the place of hearing set by the Special Master. Following said hearing, the Special Master shall make a final determination as to the claimant's entitlement under paragraph II-10, which determination shall be binding on the claimant and all other parties unless contested by either party, in which event the Special Master shall file his determination as his findings and recommendations to the Court for the final binding determination. Liberty National will be required to make restitution to each Qualified Claimant on the terms specified in paragraph II-10 within sixty (60) days after the final determination as to all proofs of claim, and the restitution

required by this paragraph II-11 as determined by the Special Master (or if disputed, by the Court) will be paid by a check payable to each pertinent named insured at the address shown in the named insured's proof of claim form. The proof of claim form and notice shall clearly notify Class Members that they must submit proof of claim forms within 120 days of mailing of the notice contemplated by paragraph II-17 below, regardless of any appeal of or objection to this Settlement, but that the filing of a proof of claim form shall not waive or otherwise preclude the Class Member's right to object to or appeal any approval of this Settlement by the Court, and that if the Court (or any appellate court) rejects any aspect of the Settlement, or if any other condition of this Settlement is not met, then the Class Member's submission of the proof of claim form shall not prejudice his right in any subsequent litigation.

12. Supplemental Extracontractual Monetary Relief Fund for Certain Class Members. Pursuant to the Injunction to be entered against Liberty National and ancillary to the equitable relief provided, the Court will order Liberty National to pay to the escrow agent the sum of three million dollars (\$3,000,000.00), subject to the terms and conditions of this settlement and the terms and conditions of the escrow agreement attached hereto as Exhibit E. Each Class Member who is a named insured under a new policy and who submits a valid and proper claim form which is determined (pursuant to the procedures of paragraph II-11) to demonstrate his/her entitlement to receive payment of restitution under the terms of paragraph II-10 ("Qualified Claimant") will, in addition to any other payment, share in this fund consisting



of three million dollars (\$3,000,000.00) to be paid by Liberty National to the escrow agent as provided in paragraph II-4. This fund will be divided among Qualified Claimants in an equitable method to be devised by the Court. The Court shall devise the most equitable methodology for distribution of this Supplemental Extra-contractual Monetary Relief Fund to all Qualified Claimants (i) per capita; or (ii) based on the amount by which each Qualified Claimant's total benefits which would have been received under the old policy exceeded the total benefits actually paid by Liberty National under the Class Member's new policy; or (iii) a combination of (i) and (ii) after determination of the number of Qualified Claimants and the amount of qualified claims. This fund shall be paid to each Qualified Claimant at the same time and in the same manner as provided in paragraph II-11 and shall be considered as ancillary to the restitution and other equitable relief afforded by the Settlement.

13. Deceased Class Members. The estate of a deceased named insured Class Member who otherwise qualifies will be entitled to any benefits for otherwise valid claims as provided by paragraph II-10, but will not share in benefits provided by paragraphs II-9 or II-12. The executor or administrator of the estate of any such deceased person shall be entitled to file the proof of claim form on behalf of the deceased and his/her estate, but shall be required to attach thereto a copy of documents sufficient to show that he/she is or was the executor or administrator of the deceased's estate. This requirement shall be clearly noted on the claim form.

14. Settlement Requires Rule 23(b)(2) Mandatory Class With No Right of Opt Out. This Settlement Agreement is conditioned on approval by the Court of a Rule 23(b)(2) mandatory class with no right to opt out, and a final court order (and final binding affirmance in the event of any appeal) expressly barring, enjoining, and precluding each Class Member from filing, prosecuting or participating as a litigant (by intervention or otherwise) in any separate individual or class suits regarding the alleged cancer policy exchange programs or asserting any claims which are to be "Released Claims" as defined in Section III below. Provided, however, that this prohibition shall not apply to restrict Named Plaintiff and Class Counsel from fulfilling their obligations under Section VI below. This Settlement Agreement is further conditioned on there being no decision by the Alabama Supreme Court inconsistent with this paragraph in any lawsuit involving the alleged cancer policy exchange programs to which Liberty National is a party prior to the entry (and final binding affirmance in the event of appeal) of the Final Judgment, approval and orders of the Circuit Court of Barbour County contemplated herein.

15. No Admission of Liability By Liberty National. Liberty National, by agreeing to the terms of this settlement, does not admit, but to the contrary denies, any liability or wrong-doing in any form or fashion by Liberty National, but has entered into this Settlement Agreement to avoid the expense, adverse publicity, and uncertainty of litigation, and for other reasons set forth above. Liberty National strongly contends that its new policies provide substantially greater overall benefits or coverage to most, if not all, insureds, and result in the payment of



greater total benefits to a majority of insureds who are later diagnosed with cancer. Liberty National denies that any Class Member or any other person would have any right to or grounds for obtaining the relief described herein, but is willing to agree to the terms of this settlement so that no Class Member can even arguably have been prejudiced by any aspect of Liberty National's decision to offer to replace its old cancer policies with a more modern policy.

16. Court Submittals. Counsel for the parties shall jointly submit to the Court and shall advise the Court that they jointly request court approval and entry of the following: (i) a proposed order preliminarily approving this Settlement Agreement and ordering notice to Class Members (attached hereto as Exhibit A); (ii) proposed notice to Class Members (attached hereto as Exhibit B) to be mailed by Liberty National and summary notice (attached hereto as Exhibit B-1) to be published by Liberty National as provided in Exhibit A, which advises them of the terms of this Settlement Agreement and of each Class Member's right to be heard concerning the fairness, reasonableness and adequacy of the settlement at a hearing before the Court; and (iii) proposed proof of claim form (attached hereto as Exhibit C) to be completed by the named insured Class Members specified in paragraph II-10 and designed to furnish information sufficient to enable Liberty National, the Special Master and the Court to calculate the amounts to which said named insured Class Members will be entitled under the terms of this Settlement Agreement if it is approved and if the conditions of this Settlement are satisfied; (iv) a proposed order and final judgment (attached hereto as Exhibit D)

which provides, *inter alia*, that the settlement is finally approved, and that all Claims asserted or which could have been asserted by Class Members regarding the alleged cancer policy exchange programs or the Released Claims (as defined in Section III below) are finally released and dismissed with prejudice (subject only to the enforcement of the terms of this settlement), and which bars and enjoins Class Members from filing, pursuing, or participating as litigants (by intervention or otherwise) in any separate individual or class actions asserting any of the Released Claims; and (v) a proposed escrow agreement (attached hereto as Exhibit E) to be executed by the escrow agent appointed by the Court and providing the duties of the escrow agent, and direction to the escrow agent as to the appropriate investments for the settlement fund, and the terms for release of the funds from escrow.

17. Notice to Class Members. As soon as practicable after preliminary approval by the Circuit Court, Liberty National shall, at its expense, mail a class action notice as required by Exhibit A, in a form approved by the Court and agreed to by Named Plaintiff, Class Counsel, and Liberty National, to the last known address of each Class Member specified in Exhibit A, which notice shall be mailed at least sixty (60) days in advance of the hearing date. Any Class Member who demonstrates that he failed to receive the class notice and who otherwise qualifies for restitution under paragraph II-10 can nonetheless avail himself of the benefits provided by paragraph II-10 within a reasonable time after receiving actual notice, and if his claim is filed before the funds provided in paragraphs II-9 and II-12 have been paid by the escrow agent,

the claimant will share in those funds as well to the extent he/she qualifies.

18. Payment of Court Costs. Liberty National shall pay all court costs taxed by the Court which shall consist of all expenses for class notice, fees and expenses of actuarial or other experts employed by Class Counsel, and fees and expenses of the Special Master as approved by the Court. Fees for the actuarial or other experts employed by Class Counsel shall not exceed the total sum of \$150,000.00, collectively. The hourly rate of the Special Master shall not exceed \$150.00 per hour.

19. Fees and Expenses for Class Counsel. Class counsel will petition the Court for an award of reasonable attorneys' fees and expenses which shall be paid by Liberty National in addition to all other costs and expenses provided for in Paragraph II-18 above in this Agreement. These attorneys' fees and expenses shall be in addition to and shall not be deducted from amounts to be disbursed to Class Members under the Settlement. The amount of attorneys' fees and expenses to be awarded to Class Counsel shall be determined by the Court, but in no event will the attorneys' fees exceed the total sum (for all Class Counsel, collectively) of 4.5 million dollars (\$4,500,000.00) for all attorneys' services relating to this Litigation, including but not limited to, services rendered and to be rendered in connection with the Settlement or its implementation. Liberty National will not object to any request for attorneys' fees in an amount not in excess of that amount. The expenses to which the Class Counsel shall be entitled will be restricted to actual and necessary out-of-pocket expenses as allowed by the Court not to

exceed \$35,000.00. These expenses shall be in addition to those specific expenses referred to in paragraph II-18.

20. Resolution of Objections. Any objections of Class Members to the certification of this action pursuant to ARCP 23(b)(2), to the fairness or adequacy of the settlement or class notice, to approval of the settlement by the Circuit Court, and any objections or disputes related to the allowance or disallowance of claims of Class Members, or the implementation or enforcement of this Settlement or the binding effect of this Settlement upon the claims of any Class Member, or relating to the award of attorneys' fees and expenses to Class Counsel within the limits imposed in paragraph II-19, or relating to any aspect of this Settlement shall be submitted to the Circuit Court of Barbour County for decision.

21. Final Judgment. This Settlement Agreement is subject to the Court entering a final judgment containing injunctive, declaratory and equitable relief (including reformation of policies, ancillary restitution and other ancillary monetary relief) necessary to implement this Agreement in substantially the form as set out in Exhibit D attached hereto. It is the intent of the parties that said Final Judgment shall be entered upon final Court approval of this Settlement Agreement. Subject to the terms and conditions of the Stipulation, Liberty National, its successors and/or assigns, and all persons or entities acting in concert with Liberty National, shall be enjoined: (i) from instituting, engaging or participating in, authorizing, maintaining, or continuing any of the alleged cancer policy exchange programs, (ii) from instituting, engaging or participating in, maintaining or authorizing any future program relating to the exchange, substitution, switching



or attempting to exchange, substitute, or switch Liberty National cancer insurance policies whereby the substituted policy excludes or limits any benefits that are provided in the replaced Liberty National cancer policy, without full disclosure of the benefits and coverages in the original and substituted policies, including disclosure of any benefits in the original policy which are excluded or limited benefits in the substituted policies; (iii) with respect to those Class Members specified in paragraph II-6, above, to reform the new policies of such Class Members currently in force to provide (subject to the terms and conditions of the Stipulation) prospective coverage without monetary limits for radiation, chemotherapy, prescription chemotherapy drugs administered to the named insured or any covered person under the new policy, and to provide prospective coverage without monetary limits or for other out-of-hospital prescription drugs prescribed to the named insured or any covered person under the new policy in connection with the treatment of cancer, so long as the current new policy remains in force and premiums are paid; (iv) from increasing the premiums on the old or new policies of Class Members prior to January 1, 1995; (v) to make restitution to the named insured Class Members for otherwise valid benefit claims heretofore accrued under the new policies of Class Members to the extent required by and in accordance with the terms and conditions of paragraphs II-10 and II-11 of the Settlement; (vi) from denying any otherwise valid future claims under the new policies of those Class Members specified in paragraph II-6 above for benefits for radiation, chemotherapy, prescription chemotherapy

drugs, and other out-of-hospital prescription drugs hereinafter administered to any covered person under the new policy in connection with cancer on the basis of any monetary limits upon or exclusions of coverage for said benefits under the new policies of such Class Members, subject to the terms and conditions of the Settlement; and (vii) to pay the two settlement funds and attorneys' fees into escrow and to pay other fees and expenses as set out in the Settlement Agreement and to implement all other terms of this Settlement. Each Class Member shall be enjoined from bringing any subsequent action asserting the Released Claims (as defined in Section III below).

22. Dismissal of Pending Claims. Subject only to final approval (and final binding affirmance in the event of appeal) of this Settlement Agreement upon the terms and conditions specified in this document and to the entry of the final judgment provided for in paragraph II-21 of this Settlement Agreement, all claims whatsoever which were or could have been asserted by the Named Plaintiff or by or on behalf of any Class Member (including, but not limited to, all claims which could have been asserted by intervention or otherwise) against Liberty National (or any of the related persons or entities to be released pursuant to Section III below) regarding the alleged cancer policy exchange programs or the Released Claims (as defined in Section III below) shall be dismissed with prejudice. Upon entry (and final binding affirmance in the event of appeal) of the final judgment provided for in paragraph II-21 of this Settlement Agreement, and without further action by anyone, each and all of the Class Members shall be deemed to have released Liberty National as set forth in Section III below.



23. Termination of Agreement. If this Settlement is not approved in its entirety by the Court by a final judgment which conforms to the provisions of this Settlement Agreement entered in accordance with Rule 54(b), or if any other condition of this Settlement Agreement is not met, then in that event: (i) the funds deposited with the escrow agent shall be returned to Liberty National together with all accrued interest; (ii) the parties and Class Members shall be restored to the status quo which existed prior to the execution of this Agreement; and (iii) the obligations of the parties to implement the settlement, other than the obligation of Liberty National to pay the fees and expenses of the actuarial expert employed by Class Counsel, any expense theretofore incurred by the Special Master and any expenses in connection with the Class notice, shall be null and void. Provided, however, that parties may, by written mutual agreement, executed in accordance with paragraph VII-5 below, waive any condition which they mutually agree is not material.

24. Nothing in this document or the orders contemplated hereby shall require Liberty National to take, or prohibit Liberty National from taking, any action with respect to persons who are not Class Members.

### III. Released Claims.

Effective upon on the final approval of all aspects of this Settlement by the Circuit Court of Barbour County, Alabama, and the final, binding affirmance of said approval in the event of any appeal, Named Plaintiff, individually and on behalf of the Class, and each Class Member, separately and severally, do hereby fully, finally,

and forever release Liberty National and each of its past, present, and/or future: parents, subsidiaries, affiliated and related entities and persons, officers, employees, directors, shareholders, agents, successors, and assigns, separately and severally, of and from all claims, causes of action and liabilities (known or unknown) which have been or could be asserted by any Class Member, whether arising under state or federal statutory or common law, to the extent such claims, causes of action or liabilities arise from, are connected with, or are in any way based upon or related to any allegation of fraud, misrepresentation, concealment, failure to disclose, or other tortious conduct or breach of duty which occurred in whole or in part on or before the date of this Settlement Agreement, regarding (1) the alleged cancer policy exchange programs, (2) any other transaction resulting in the issuance of a new policy providing cancer coverage for a Class Member previously insured under an old policy, or (3) the failure to offer or issue any Class Member a new policy (the "Released Claims").

### IV. Procedures to Obtain Court Approval.

The parties agree, as soon as practicable after execution of this Settlement, to take all necessary steps to obtain Court approval of the Settlement, as follows:

(a) the parties shall apply jointly for entry of an Order With Respect to Proposed Settlement (the "Preliminary Order") substantially in the form attached hereto as Exhibit A (i) providing that, for the purposes of settlement only, the Litigation shall proceed as a class action pursuant to ARCP 23(b)(2); (ii) directing that notice of the

proposed Settlement be provided by Liberty National to all Class Members specified in Exhibit A who can reasonably be identified by individual notice delivered by first class mail to the last known address of each Class Member, substantially in the form attached hereto as Exhibit B, and by onetime publication of a summary notice, substantially in the form attached hereto as Exhibit B-1, in the newspapers listed in the Preliminary Order; (iii) setting a hearing date for a fairness hearing pursuant to ARCP 23; and (iv) providing that any Class Member who objects to this Stipulation or to any part thereof, or to the fairness, adequacy or reasonableness of the Settlement, or to the procedures provided for herein, or to the maintenance of the Litigation under ARCP 23(b)(2), or to the contents and method of delivery of the notice, or to any Order or findings entered by the Court, may appear at the Settlement Hearing to show cause why the Settlement should not be approved, provided that such Class Member files at least ten (10) days prior to the date of the Settlement Hearing his or her written objections (and any briefs or supporting papers) with the Clerk of the Court and serves copies thereof upon counsel designated in the Preliminary Order to receive the same.

(b) following the fairness hearing, the parties shall jointly file a Motion for an Order and Final Judgment in substantially the form attached hereto as Exhibit D, approving the Settlement, and dismissing with prejudice all Released Claims (as defined in Section III above) which have been or could have been asserted by Named Plaintiff and all Class Members against Liberty National. It is contemplated by the parties that the Court shall, in

accordance with applicable law, enter appropriate Findings of Fact and Conclusions of Law regarding the approval or disapproval of this settlement, disposition of any objections which may raised [sic] at or in conjunction with the fairness hearing.

#### V. Costs of the Notice.

Liberty National agrees to pay the costs of preparation of the agreed-upon notice to Class Members of the proposed Settlement if said notice is approved by the Court, as well as the costs of delivery, mailing and publication of the Notice.

#### VI. Other Actions.

If any Released Claims (as defined in Section III above) are brought by any person in any court prior to the entry (and final binding affirmance in the event of any appeal) of a final judgment in the Litigation pursuant to the terms contemplated herein, all parties and Class Counsel shall cooperate to have the action (or actions) transferred to the Circuit Court of Barbour County, Alabama in which the Litigation is pending and to seek dismissal of the action (or actions) or to have such action or actions consolidated with this Litigation and subject to resolution pursuant to this Settlement. This paragraph shall be binding upon all parties and Class Counsel immediately upon final approval of this Settlement by the Circuit Court and shall continue to be effective unless and until said approval of the Settlement is reversed or vacated on appeal.



## VII. Miscellaneous.

1. Additional Documentation. The parties agree to execute such additional documents as may be reasonably necessary to effectuate the settlement.

2. Authority to Execute. The undersigned person executing this agreement on behalf of Liberty National represents and warrants to the Plaintiff, Class Members and the Court that he is authorized to execute this agreement and to fully bind Liberty National to its terms.

3. Counterparts. This agreement may be simultaneously executed in several counterparts, each of which shall be deemed an original and all of which shall constitute but one and the same instrument. This agreement may also be executed in duplicate originals each of which shall be deemed an original for all purposes.

4. Entire Agreement. This document and the exhibits referenced herein constitute the entire agreement between the parties with regard to the subject matter hereof and all negotiations, oral or otherwise, prior to the execution of this Settlement Agreement are merged herein. The terms of this agreement may not be modified, varied or amended except in writing signed by all parties hereto and approved by the court.

5. Parties Bound. This agreement shall be binding upon and inure to the benefit of the parties hereto including all Class Members and their respective heirs, predecessors, privies, administrators, executors, representatives, guardians, successors and assigns.

6. Continuing Jurisdiction. All proceedings with respect to the Settlement and the determination of all

controversies relating thereto, including but not limited to enforcement of the judgment and of the terms of the Settlement and resolution of any disputed questions of law and fact with respect to the release of the Released Claims, shall be subject to the continuing jurisdiction of the Circuit Court of Barbour County, Alabama.

7. Counsels' Authority to Execute. Each of the attorneys executing this Settlement on behalf of Liberty National or Robertson, as Named Plaintiff and as Class Representative, warrants and represents that he or she has been duly authorized and empowered to execute this Stipulation on behalf of such party.

8. Nothing in this document or the judgments or orders contemplated hereby shall require Liberty National to provide insurance coverage for the treatment of a disease or condition which is not otherwise covered by the pertinent policy, or for drugs or treatments which have not [sic] approved for use in this country as described in the policies nor shall anything in this Agreement require Liberty National to allow the same insured to be covered under more than one (1) Liberty National cancer policy at the same time. No act of Liberty National in implementing any provisions of the Settlement at or before the time required hereunder shall estop or otherwise preclude Liberty National, in any respect, from withdrawing any benefits or coverage contemplated hereunder in the event this Settlement is rejected by the Court or reversed, vacated, or modified on appeal.

IN WITNESS WHEREOF, and intending to be legally bound thereby, this Settlement has been executed this 16th day of June, 1993 by the undersigned counsel on



behalf of their respective clients, and by the Named Plaintiff and Liberty National.

/s/ Jere L. Beasley  
JERE L. BEASLEY  
One of the Attorneys for Named Plaintiff and Class

OF COUNSEL:

BEASLEY, WILSON, ALLEN,  
MAIN & CROW, P.C.  
P.O. Box 4160  
Montgomery, Alabama 36103-4160  
(205) 269-2343

/s/ Walter R. Byars  
WALTER R. BYARS  
One of the Attorneys for the Class

OF COUNSEL:

STEINER, CRUM & BAKER  
P.O. Box 668  
Montgomery, Alabama 36101-0668  
(205) 832-8800

/s/ James W. Gewin  
JAMES W. GEWIN  
One of the Attorneys for Liberty National

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE  
1400 Park Place Tower  
Birmingham, Alabama 35203  
(205) 521-8000

LIBERTY NATIONAL LIFE  
INSURANCE COMPANY

BY: /s/ William C. Barclift  
Its General Counsel

/s/ Charlie F. Robertson  
CHARLIE FRANK ROBERTSON,  
Individually and as court-  
approved representative of the  
Class

---

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, *	*
for himself, and in his	*
representative capacity for the	* Case Number:
class of persons described	* CV-92-021
herein,	*
	*
Plaintiff,	*
	*
vs.	*
	*
LIBERTY NATIONAL LIFE	*
INSURANCE COMPANY,	*
	*
Defendant.	*

ORDER ON MOTIONS TO INTERVENE

(Filed June 16, 1993)

Motions to intervene, having been filed by Willard C. Griffith, Sara E. Griffith, Dawn R. Tubb, Edith E. Fellows, Edna F. Brock, Guy Adams, Alice S. Adams, Johnny L. Fellows, Floyd E. Nelson, Delores H. Nelson, Arnold F. Pitt, Almitta Pitt, Eunice W. Long, Marsha N. Britton, and Jewel N. Jones, and the Court having considered same, is of the opinion that the motions should be granted and hereby Orders as follows:

1. The motions to intervene are hereby granted.
2. Each of the Intervenor is hereby made a party to this action and shall be bound by all Orders of this Court.
3. On or before July 6, 1993, Intervenor shall show cause as to why the Court should reconsider its prior Order of March 10, 1993.

4. On or before, July 6, 1993, Intervenor shall file briefs and supporting affidavits in support of their respective positions.

5. A hearing on Intervenor's petition is hereby set for July 27, 1993, at 9:00 a.m. in Clayton, Alabama.

6. The Court reserves ruling on requests (1), (2), and (3) in paragraph one of the Long motion.

DATED: June 16, 1993.

/s/ W. H. Robertson  
CIRCUIT JUDGE

cc: Jere L. Beasley  
Frank M. Wilson  
James Allen Main  
Walter R. Byars  
Horace G. Williams  
James W. Gewin  
William C. Roedder, Jr.  
W. Alexander Moseley  
W. Boyd Reeves  
Norman E. Waldrop, Jr.  
M. Kathleen Miller

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, *	•	
for himself, and in his	•	
representative capacity for the	•	Case Number:
class of persons described	•	CV-92-021
herein,	•	
	•	
Plaintiff,	•	
	•	
vs.	•	
	•	
LIBERTY NATIONAL LIFE	•	
INSURANCE COMPANY,	•	
	•	
Defendant.	•	

**ORDER WITH RESPECT TO  
PROPOSED SETTLEMENT**

(Filed June 16, 1993)

The parties to the above-captioned action having applied for an Order determining certain matters in connection with a proposed settlement in accordance with the Stipulation and Agreement of Compromise and Settlement ("the Stipulation" or "the Settlement"), and the Court having heretofore entered an order certifying this action as a Class Action;

NOW, upon the motion of the parties, after consideration of the Stipulation (Exhibit 1 hereto) and the exhibits annexed thereto, and after due deliberation, and consideration of the totality of the circumstances and the record, and for good cause shown, it is hereby

ORDERED, that:

1. The terms of the Settlement are preliminarily approved, subject to further consideration thereof at the Settlement hearing described below. The parties shall have twenty (20) days to make any modifications or corrections to the Stipulation or its exhibits which they mutually agree to be necessary, subject to further approval of the Court. Thereafter, modifications shall not be permitted except by mutual agreement by leave of Court with good cause shown.

2. The Court hereby reaffirms that this action shall be maintained as a Class Action pursuant to Alabama Rule of Civil Procedure 23(b)(2), by the Named Plaintiff as Class Representative and by the Named Plaintiff's counsel as Class Counsel, on behalf of a Class consisting of the following:

"All persons who now or in the past were insured under any cancer policy which (1) was issued by Liberty National Life Insurance Company ("Liberty National") on or before August 29, 1986, and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; *provided, however*, that (i) any individual insured who is or was a named plaintiff in any separate lawsuit against Liberty National which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale,



issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the Class *unless* such lawsuit has been voluntarily dismissed without prejudice on or before the date this settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any individual insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the Class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the Class."

The description of the Class described herein shall clarify and relate back to the date of the prior Class certification order heretofore entered by the Court.

3. The Court finds for the purposes of settlement that the Named Plaintiff's counsel are adequate representatives of and the Class Counsel for respectively, and that all requirements of A.R.C.P. 23(a) and 23(b)(2) are met. The Court expressly finds, for purposes of these Settlement proceedings, that the Class is so numerous that the joinder of all members is impracticable; that Class Counsel is experienced and has adequately represented and will adequately represent the Class; that there are questions of law and fact common to the Class; the claims of Named Plaintiff are typical of the claims of the Class; that Named Plaintiff is an adequate representative of the Class; and that the representative parties have fairly and adequately protected the interests of the Class and will continue to do so. The Court finds that maintenance of this action as a Class Action pursuant to the Ala.R.Civ.P.

23(b)(2) is superior to any other means of adjudicating the claims herein raised. The Court further finds, for purposes of these Settlement proceedings, that Defendant's alleged conduct is generally applicable to the Class, thereby making appropriate injunctive and equitable relief with respect to the Class as a whole. The Court further finds, for purposes of these Settlement proceedings, that maintenance of this action pursuant to Rule 23(b)(2) is superior to maintenance of this action pursuant to Alabama Rule of Civil Procedure 23(b)(3), in that the vast majority of Class Members have not suffered cancer and have incurred little or no actual monetary damage as a result of the matters made the basis of the complaint. Moreover, the primary relief justified by the conduct alleged and the primary relief under the Settlement is injunctive relief whereby the Defendant would be enjoined from enforcing certain policy limitations, to effect a reformation of certain policies, and to make restitution and other monetary relief available to certain Class Members incidental to the primary equitable relief. The Court finds that all monetary relief provided by the Settlement is secondary and incidental to the primary injunctive and equitable relief. In these circumstances, the Court finds that certification pursuant to Rule 23(b)(2) would best facilitate the provision of maximum relief to the entire Class as a whole, including those who have suffered no damage or purely speculative damage at the present time but could otherwise arguably suffer damage in the future.

4. A hearing shall be held on October 20, 1993 at 9:00 a.m. at the Barbour County Courthouse in Clayton, Alabama. The purposes of the hearing shall be (a) to

determine whether the proposed Settlement on the terms and conditions of the Stipulation is fair, reasonable, and adequate and should be approved by the Court; (b) to determine whether Final Judgment should be entered in this action pursuant to the proposed Settlement; (c) to entertain any objections of any affected person(s) as to the certification of the Class, the proposed Settlement, or any other matter related thereto; and (d) to rule on all other matters pertaining to the proposed Settlement and such other matters as the Court may deem appropriate.

5. The Court reserves the right to adjourn the hearing without further notice of any kind other than oral announcement at the hearing.

6. The Court reserves the right following the hearing to approve the Settlement with or without modification and with or without further notice of any kind.

7. Liberty National shall use its best efforts to cause notice to be given to all persons identified as members of the Class, in accordance with this Order, as follows:

a. Not later than sixty (60) days after the entry of this Order, mail (by first class mail, postage prepaid) a Notice of Hearing and Settlement substantially in the form of Exhibit B to the Stipulation ("the notice") to each of the following persons whose identities and last known addresses are reasonably ascertainable from Liberty National's records; all persons listed as the named insured on Liberty National cancer insurance policies which are presently in force; all persons who were listed as the named insured on Liberty National cancer policies which were issued prior to August 29, 1986 and which were in force or in the grace period as of

that date; and all persons who are listed as the named insured under each "new policy" (as that term is defined in the Stipulation) pursuant to which any claim for radiation, chemotherapy, prescription chemotherapy drugs, or out-of-hospital prescription drugs prescribed in the treatment of cancer has been submitted (to Liberty National) since August 29, 1986. Provided, however, that Liberty National need not send notice to any such person whom Liberty National can identify from its records as being a person who is not a member of the Class. The notice shall include a copy of the Stipulation, as well as a copy of this Order, the proof of claim form contemplated by the Stipulation, and a copy of the proposed Order and Final Judgment attached as Exhibit E to the Stipulation.

b. With respect to any notices which are returned by the postal service undelivered, Liberty National shall use its best efforts to identify the present address of the intended recipient and to mail or personally deliver notice to each such individual no later than thirty (30) days in advance than [sic] the fairness hearing.

c. Not later than seventy-five (75) days after the entry of this Order, Liberty National shall cause to be published in the legal notices section of the following newspapers: *Clayton Record*, Clayton, Alabama; *Eufaula Tribune*, Eufaula, Alabama; *Union Springs Herald*, Union Springs, Alabama; *Mobile Press Register*, Mobile, Alabama; *Montgomery Advertiser/Journal*, Montgomery, Alabama; *Birmingham News*, Birmingham, Alabama; *Huntsville Times*, Huntsville, Alabama; *Dothan Eagle*, Dothan, Alabama; *Anniston Star*, Anniston, Alabama; and *USA Today*, and at least



one major newspaper (within the top three in circulation) in each other State in which Liberty National cancer policies are approved for issuance, a one-time summary notice of the hearing and Settlement, substantially in the form attached hereto as Exhibit B-1, including the name and address of Class Counsel from whom copies of the notice can be obtained upon request;

d. At least 7 days prior to the hearing, Liberty National and Class Counsel shall file or cause to be filed a proof of distribution of the notice in accordance with this paragraph 7. Said proof shall be in the form of affidavits executed by an appropriate representative of Liberty National and by Class Counsel verifying their compliance with the provisions of this paragraph 7.

8. The Court finds that the form and method of notice specified herein is the best notice practicable under the circumstances, and, if carried out, shall constitute due and sufficient notice of the Settlement and all other matters addressed in the notice and its exhibits, including without limitation, the pendency of this action, the maintenance of this action as a Class Action pursuant to Alabama Rule of Civil Procedure 23(b) (2), the terms of Settlement, the binding effect of the Settlement on all members of the Class, and the hearing, to all persons entitled to receive such notice. The notice attached as Exhibit B to the Stipulation is hereby approved.

9. Any briefs or other documents in support of the Settlement and in support of Named Plaintiff's request for an award of attorneys' fees and expenses shall be filed

by the parties with the Clerk of the Court not less than 3 days prior to the Settlement hearing.

10. Any member of the Class may appear at the hearing, in person or by counsel (if an appearance is filed and served as hereinafter provided), and be heard to the extent allowed by the Court in support of, or in opposition to the fairness, reasonableness and adequacy of the Settlement, the terms and conditions of the Settlement, the Final Judgment to be entered herein, the procedures adopted by the Court for its determination of whether to approve the Settlement, including but not limited to, maintenance of the action pursuant to Alabama Rule of Civil Procedure 23(b) (2), the binding effect of the Settlement on all members of the Class, the content and method of delivery of the notice, any orders or findings entered by the Court, Class Counsel's request for an award of attorneys' fees and expenses, and all other matters pertaining to this proposed Settlement. PROVIDED, HOWEVER, THAT NO CLASS MEMBER SHALL BE HEARD OR ENTITLED TO CONTEST SUCH MATTERS UNLESS THAT CLASS MEMBER HAS SERVED, NOT LESS THAN 10 DAYS BEFORE THE HEARING, BY HAND DELIVERY OR FIRST CLASS MAIL, POSTAGE PREPAID, WRITTEN OBJECTIONS AND COPIES OF ANY SUPPORTING PAPERS AND BRIEFS (WHICH MUST CONTAIN PROOF OF MEMBERSHIP IN THE CLASS) UPON THE FOLLOWING COUNSEL:

Designated recipient for Named Plaintiff: Jere Beasley,  
Beasley, Wilson, Allen, Main & Crow, P.C.  
P.O. Box 4160, Montgomery, Alabama 36103-4160

Designated recipient for Defendant: James Gewin,  
Bradley, Arant, Rose & White



1400 Park Place Tower, Birmingham, Alabama 35203

AND UNLESS THAT CLASS MEMBER HAS ALSO FILED SUCH OBJECTION, PAPERS AND BRIEFS, SHOWING DUE PROOF OF SERVICE UPON NAMED PLAINTIFF'S DESIGNATED RECIPIENT AND DEFENDANT'S DESIGNATED RECIPIENT, WITH THE CLERK OF THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA, CLAYTON, ALABAMA, COURTHOUSE, COURT SQUARE, CLAYTON, ALABAMA 36016 ON OR BEFORE OCTOBER 10, 1993 (10 DAYS IN ADVANCE OF THE FAIRNESS HEARING). NO PARTICULAR FORM OF WRITTEN OBJECTION IS REQUIRED. A SHORT, PLAIN STATEMENT OF EACH OBJECTION AND THE GROUNDS THEREFOR WILL BE SUFFICIENT. CLASS MEMBERS WHO WISH TO OBJECT MAY, BUT ARE NOT REQUIRED TO, OBTAIN COUNSEL AT THEIR OWN EXPENSE TO REPRESENT THEM IN CONNECTION WITH ANY SUCH OBJECTION. HANDWRITTEN OBJECTIONS WILL BE CONSIDERED.

11. Unless the Court otherwise directs, no member of the Class shall be entitled to be heard or object with respect to the fairness, reasonableness, or adequacy of the Settlement, the terms and conditions of the Settlement, any Final Judgment to be entered herein, the procedures adopted by the Court to consider approval of the Settlement, the binding effect of the Settlement on all members of the Class, the maintenance to the action as a Class Action pursuant to Alabama Rule of Civil Procedure 23(b)(2), the content and method of delivery of the notice, or any orders or findings entered by the Court, or any other matter pertaining to approval or disapproval of the Settlement, unless such Class Member shall have first

served and filed written objection as prescribed above. Any Class Member who fails to object in the manner prescribed above shall be deemed to have waived all such objections and any other objections relating to the subject matter of the litigation, and shall be forever barred from raising such objections or relitigating his individual claims in those or any other action or proceeding. Each Class Member desiring to object must file his own objection and appear personally or by counsel. No Class Member will be heard to assert purported objections of any other Class Member.

12. Pending final determination of whether the Settlement should be approved, the Named Plaintiff and all members of the Class are hereby enjoined and prohibited from commencing or prosecuting any action, either directly, individually, representatively, or in any capacity, asserting any claims which are proposed to be released pursuant to this Settlement (Released Claims, as defined in Section III of the Stipulation). Provided, however, that this Order shall not restrict the prosecution of the individual claims of any person who was a named plaintiff in any suit filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies.

13. If the Settlement (including any modification thereto with the consent of the parties made as provided for in the Stipulation) is approved by the Court following the hearing, an Order and Final Judgment substantially in the form annexed to the Stipulation as Exhibit 2 may be entered: (i) approving the final certification of the Class

described in paragraph 2 hereof; (ii) approving the Settlement and all transactions preparatory or incidental thereto and all terms and conditions of the stipulation as valid, fair, reasonable, and adequate, and directing consummation of the Settlement in accordance with the terms and provisions of the Stipulation; (iii) enters a final injunction and other declaratory and equitable relief permanently enjoining and requiring Liberty National to perform its obligations (including reformation of the new policies, ancillary restitution and the ancillary monetary relief) set forth in this Settlement Agreement (the "Injunction"), and subject to said Injunction and the right to enforcement thereof pursuant to the continuing jurisdiction reserved by the Court, approves the release of and dismisses with prejudice all claims asserted or which could have been asserted in this Litigation by or on behalf of the Class Members or any of them against the Defendant relating to the alleged cancer policy exchange programs or to the Released Claims as defined in Section III of the Stipulation; (iv) permanently barring and enjoining each and all Class Members from filing or participating as a litigant in any individual lawsuit or class action relating to the alleged cancer exchange programs or asserting any of the Released Claims (as defined in Section III of the Stipulation); and (v) reserving jurisdiction over all matters related to the administration, consummation, interpretation, and enforcement of the Stipulation and Settlement.

14. Those Class Members who are described in paragraphs II-9, II-10, and II-12 of the Stipulation and who otherwise qualify thereunder for the restitution and ancillary monetary relief provided in those paragraphs

must submit completed proof of claim forms to Class Counsel, in accordance with the instructions set forth on the proof of claim form, no later than December 20, 1993 (120 days after the deadline for the mailing of the notice described in paragraph 7(a) of this Order). This deadline must be complied with regardless of whether the person eligible to submit the proof of claim form objects to the Settlement. If the Settlement is not approved by this Court, or if the approval of the Settlement is set aside by an appellate court, a Class Member's submission of the proof of claim form shall in no way prejudice the rights of said Class Member in any subsequent litigation. If the Settlement is ultimately approved and affirmed in the event of any appeal, the restitution and ancillary monetary relief provided for in paragraphs II-9, II-10, and II-12 of the Stipulation shall be payable only to those persons who submit true and proper claim forms on or before December 20, 1993 and otherwise qualify for said relief under the terms of the Stipulation. The filing of a proof of claim form shall not waive or preclude the claimant's right to object to or appeal from this Settlement.

15. If the Settlement is not approved by the Court or shall not become effective for any reason whatsoever, then, and in that event, the Settlement proposed in the Stipulation and any actions taken or to be taken in connection therewith (including this Order and any judgment entered herein) shall be terminated and shall become void and have no further force and effect except for Liberty National's obligation to pay for any expenses incurred in connection with the notice provided for by this Order, and incurred in the employment of an actuarial expert for Class Counsel.



DONE, ORDERED, ADJUDGED AND DECREED,  
this 16th day of June, 1993.

/s/ W. H. Robertson  
CIRCUIT JUDGE

---

IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf	)	
of a class,	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. CV-92-021
v.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant.	)	

MOTION FOR SUBSTITUTION OF NEW FAIRNESS  
HEARING DATE IN DOCUMENTS TO BE MAILED  
TO CLASS MEMBERS, FOR DESIGNATION OF  
ADDRESS FOR SPECIAL MASTER, FOR  
CORRECTION OF TYPOGRAPHICAL ERROR IN  
JUNE 16, 1993, ORDER WITH RESPECT TO  
PROPOSED SETTLEMENT, AND FOR CORRECTION  
OF INADVERTENT OMISSION IN STIPULATION  
PRIOR TO MAILING OF CLASS ACTION  
NOTICE AND ATTACHMENTS

(Filed August 2, 1993)

Defendant Liberty National Life Insurance Company, with the consent of Class Counsel, hereby moves the court for: (1) Permission to substitute the corrected date of November 4, 1993 as the date of the Fairness Hearing in all documents to be mailed to Class Members; (2) for an order designating a post office box for use of the Special Master to be appointed by the Court, so that the address thereof may be listed in the appropriate places in the Notice and Proof of Claim Form to be mailed to



members of the class; (3) the correction of a typographical error or omission in paragraph 3 of the Court's Order With Respect to Proposed Settlement of June 16, 1993; and (4) the approval of the correction of an inadvertent omission in the Stipulation as provided in Exhibit A, attached, prior to mailing of the Notice and Stipulation to class members. As grounds therefor, Liberty National would show unto the Court as follows:

1. The Notice and Proof of Claim Form to be mailed to class members contains instructions to return the Proof of Claim form to the Special Master. However, as yet, no address has been designated by the Court for return of the Proof of Claim Forms. Before the Notice and Proof of Claim Form can be mailed to class members, an address must be inserted. The Notice, Proof of Claim Form and other attachments are due to be mailed on approximately August 16, 1993.

2. In the Court's Order With Respect to the Proposed Settlement, and particularly in paragraph 3 thereof, there is the following clause:

3. The Court finds for purposes of settlement that the Named Plaintiff's counsel are adequate representatives of and the Class Counsel for respectively, . . .

June 16, 1993 Order With Respect to Proposed Settlement,  
¶ 3. There appears to have been an omission from this clause which makes the clause unintelligible. Counsel for the class and for Liberty National believe that the sentence was supposed to read as follows:

3. The Court finds for purposes of settlement that the Named Plaintiff and Class Counsel are adequate representatives of and counsel for the Class, respectively, . . .

Liberty National therefore requests the Court to order that paragraph 3 of the June 16, 1993 "Order With Respect to Proposed Settlement" is amended as herein reflected.

3. Liberty National further seeks permission from the Court to substitute the date of November 4, 1993 (in place of October 20, 1993) as the date of the fairness hearing for purposes of the printed notice, proof of claim form, and other documents to be mailed to Class Members, in accordance with the Court's oral announcement on July 27, 1993.

4. The Stipulation and Agreement of Compromise and Settlement executed by Liberty National and Class Counsel on June 16, 1993 contains an inadvertent omission which was discovered during the process of proof-reading the notice for purposes of printing and mailing. Under the Paragraph II-6 of the Stipulation, the Stipulation makes it clear that reformation of new policies currently in force will be available not only to class members who contemporaneously exchanged an old policy for a new policy, but also to "class members who lapsed the old policy, but bought a new policy within 30 days of that lapse, and those class members who originally contemporaneously switched from an old policy to a new policy, but subsequently switched from one policy to another new policy". Obviously, the same language should have been carried over to Paragraphs II-9, II-10, and II-12 of the Agreement, which deal with restitution and eligibility to share in the two supplementary pools. However, this

language was inadvertently omitted from paragraphs II-9, II-10, and II-12 of the Stipulation. As shown by Exhibit A hereto and pursuant to this Court's June 16, 1993 Order, Named Plaintiff, Class Counsel and Liberty National are in agreement that the Stipulation should be corrected in this regard before the printed notice and Stipulation are mailed to class members.

WHEREFORE, Liberty National respectfully requests the Court to enter an Order designating a post office box or address for return by class members of the Proof of Claim forms to the Special Master; to enter an order correcting paragraph 3 of the June 16, 1993 "Order With Respect to Proposed Settlement" as reflected herein or in such manner as the Court may deem appropriate; to enter an order approving the substitution of the date of November 4, 1993 as the date of the fairness hearing in all documents to be mailed to Class Members; and to enter an Order approving the correction of the inadvertent omission described above in the Stipulation and Agreement of Compromise and Settlement before said Stipulation is mailed to class members. For the convenience of the Court, a proposed order is attached.

/s/ James W. Gewin  
James W. Gewin

/s/ Michael R. Pennington  
Michael R. Pennington  
Counsel for Liberty National  
Life Insurance Company

#### OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE  
1400 Park Place Tower  
Birmingham, Alabama 35203  
(205) 521-8000

/s/ Horace Williams  
Horace Williams  
Counsel for Liberty National  
Life Insurance Company

P. O. Box 896  
Eufaula, Alabama 36072-0896

#### CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing Motion For Designation Of Address Of Special Master, for Correction of Typographical Error in Proposed Order of June 16, 1993, and for Correction of Inadvertent Omission in Stipulation Prior to Mailing of Class Action Notice And Attachments on

William Roedder, Esq.  
Hand, Arendall, Bedsole,  
Greaves and Johnston  
P. O. Box 123  
Mobile, Alabama 36601,

Mary Katherine Miller, Esq.  
Armbrecht, Jackson, DeMouy,  
Crowe, Holmes & Reeves  
P. O. Box 290  
Mobile, AL 36601

John Richardson, Esq.  
Richardson, Daniel,  
Spear and Upton  
P. O. Box 16428  
Mobile, Alabama 36609

Joe Sullivan, Esq.  
Hamilton, Butler, Riddick,  
Tarlton & Sullivan  
P. O. Box 1743  
Mobile, AL 36633-1743

Frank Wilson, Esq.  
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10th Floor Bell Building  
807 Montgomery Street  
P. O. Box 4160  
Montgomery, Alabama 36103-4160

Walter Byars, Esq.  
Steiner, Crum & Baker  
8th Floor  
First Alabama Bank Building  
Montgomery, AL 36104

Larry U. Sims, Esq.  
Helmsing, Lyons, Sims & Leach  
P. O. Box 2767  
Mobile, Alabama 36652-2767

by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to their regular mailing address, on this 30 day of July, 1993.

/s/ Horace Williams  
Of Counsel

Exhibit A

IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON, )  
individually and on behalf )  
of a class, )

Plaintiffs, )

v. )

LIBERTY NATIONAL LIFE )  
INSURANCE COMPANY, )

Defendant. )

CIVIL ACTION  
NO. CV-92-021

AMENDMENT TO JUNE 16, 1993 STIPULATION AND  
AGREEMENT OF COMPROMISE AND SETTLEMENT

Named plaintiff Charlie Frank Robertson, Class Counsel Jere Beasley, James Main, Frank Wilson, and Walter Byars, and defendant Liberty National hereby agree, subject to court approval, that the Stipulation and Agreement of Compromise and Settlement ("Stipulation") heretofore executed by them on June 16, 1993, is hereby amended to correct an inadvertent omission, by adding the following sentence to the end of each of paragraphs II-9, II-10 and II-12 of the Stipulation.

Class members eligible hereunder for the benefits of this paragraph shall include and be limited to those class members described in this paragraph who contemporaneously switched from an old policy to a new policy (including class members who lapsed the old policy, but bought a new policy within 30 days of that



lapse), and any such class members who originally contemporaneously switched from an old policy to a new policy but subsequently switched from one new policy to another new policy.

DATED: July 29, 1993.

/s/ Charlie Frank Robertson  
Charlie Frank Robertson,  
Named Plaintiff, individually  
and on behalf of the Class

/s/ Jere Beasley  
Jere Beasley

/s/ Frank Wilson  
Frank Wilson

/s/ James Main  
James Main  
Class Counsel

OF COUNSEL:

Beasley, Wilson, Allen,  
Main & Crow  
10th Floor Bell Building  
807 Montgomery Street  
P. O. Box 4160  
Montgomery, Alabama 36103-4160

/s/ Walter Byars  
Walter Byars, Class Counsel

OF COUNSEL:

Steiner, Crum & Baker  
8th Floor  
First Alabama Bank Building  
Montgomery, AL 36104

LIBERTY NATIONAL LIFE  
INSURANCE COMPANY

By: /s/ William C. Barclift  
William C. Barclift  
Its: General Counsel

/s/ James W. Gewin  
James W. Gewin  
One of the Attorneys for  
Liberty National Life  
Insurance Company

OF COUNSEL:

BRADLEY, ARANT,  
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1400 Park Place Tower  
Birmingham, Alabama 35203  
(205) 521-8000

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IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON, \*  
for himself and in his \*  
representative capacity for the \*  
class of persons described herein, \*

Plaintiff, \*

CASE NO.  
CV-92-021

v. \*

LIBERTY NATIONAL \*  
INSURANCE COMPANY, \*

Defendant. \*

OBJECTION TO CLASS CERTIFICATION, CLASS  
NOTICE, DENIAL OF DISCOVERY, ISSUANCE OF  
INJUNCTION AND CLASS SETTLEMENT, AND  
ALTERNATIVE REQUEST TO OPT OUT OF CLASS

Come now the following Objectors: Guy and Alice Adams, Retha B. Attaway, Herman and Beatrice Bateman, Edna F. Brock, Dr. Neil Capper, Billy and Anna Clausen, John and Mary Day, Arthur and Peggy Dickinson, Edith E. Fellows, Johnny F. Fellows, Mary L. Fowler, Willard Griffith, Sara Griffith, Dawn R. Tubb, Johnnie and Bertha Jones, John and Hazel Jefferson, George and Mary Kountz, Martha Massengale, Seraphim Massengale, Floyd and Delores Nelson, Ethel M. Offord, Vernon and Estelle Permenter, Mary Perez, Arnold and Almetta Pitt, Alex and Doris Rivers, Joseph and Joy Savell, Ola Saxon, John and Mary Stockman, John and Grace Turner, Charles and Linda Warren, Colonel and Jeanne Weaver, Catherine H. Whigham, James and Betty White, Edna White, Sheila

White, Tommy White, Melvin and Rita Williams, and Bertha Williams, who hereby object to the Certificate of a Rule 23(b)(3) class in this matter, to the denial of discovery sought by intervenors, to the injunction issued by this Court on June 16, 1993, to the Class Notice served in August, 1993, and to the fairness of the proposed class settlement, and we hereby give notice of our intention to appear and testify at the fairness hearing scheduled to commence on November 4, 1993. Alternatively, we request that the Court permit us to opt out of the class heretofore certified in this litigation so that we can independently pursue our own claims against the Defendant and others for their fraud and other misconduct. Our objection and alternative request are based upon the following:

1. We were insured under a cancer policy ("Old Policy") that was issued by Liberty National on or before August 29, 1986, and that provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and it was paid and in force (or in the grace period) on or after August 29, 1986. We are not named plaintiff in any lawsuit against Liberty National filed on or before March 10, 1993 alleging fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies. Our "old policy" did not lapse prior to August 29, 1986. Our first Liberty National cancer policy was not a new policy form issued after August 29, 1986. We were thereafter induced to replace this policy with a new Liberty National cancer policy ("New Policy"). We

were induced to agree to this replacement (i) by misrepresentation that the New Policy was better than the Old Policy, (ii) by the suppression of the fact that the New Policy contained substantial limitations upon expenses incurred for chemotherapy, radiation therapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, (iii) by an incomplete, inaccurate and misleading comparison of the terms, conditions or benefits contained in the Old Policy and the New Policy; and/or (iv) by misrepresentations that the Old Policy was no longer available and that we were required to switch to the New Policy. We understand that the misrepresentations made to me were part of a pattern of intentional wrongful conduct carried out by Liberty National and others.

2. The class was improperly certified in this case because the claims of Charlie Frank Robertson are not typical of the claims of the other class members.

3. The class was improperly certified in this case because the claims of Charlie Frank Robertson are not common to all class members.

4. The class was improperly certified in this case because Charlie Frank Robertson is not an adequate representative of the interests of class members.

5. The class was improperly certified because the requirements of Rule 23(a), Alabama Rules of Civil Procedure, have not been shown to have been met.

6. The class was improperly certified because this action, and/or the claims Class Counsel have attempted to compromise, are not primarily injunctive in nature.

7. The class was improperly certified because the party "opposing" the class, Defendant, and other parties proposed to be exculpated by the proposed settlement herein, have not acted or refused to act on grounds generally applicable to the class.

8. In support of our position that the class should not be certified, the settlement should not be approved and that we should be allowed to opt out of the class we adopt by reference all grounds set forth in Sections A, B and C of the Intervention Petition and Motion to Amend Intervention Petition filed with this Court and served on counsel of record on June 10, 1993 and June 25, 1993, respectively, as additional grounds for this pleading.

9. Class Counsel have not acted in the best interests of the class members, they represent class members who have different and conflicting interests, have not acted competently in respect of the interests of the class members, and have otherwise not adequately represented the best interests of the class members.

10. Class Counsel participated in the defining of the class in such a fashion as to permit them to file independent fraud suits for certain of their clients against Liberty National (i.e., suits filed on or before March 10, 1993 are not precluded by the class action), providing those clients with the equivalent of "opt-out" rights not provided to the remainder of the class. Those clients then elected (through their counsel) to opt-out by filing suits against Liberty National on or before March 10, 1993. Although some of these claims were later dismissed without prejudice, the filing of such action afforded all such plaintiffs a right to elect to opt into or out of the class, a right not



enjoyed by other class members. Some such claims remain pending, and the dismissed claims have been settled. Such action constitutes an acknowledgment that pursuit of individual claims, not participation in the class action and its proposed settlement, is in the best interests of class members.

11. The class notice approved by the Court and sent to class members is misleading, inadequate and insufficient. The notice contains misstatements/mischaracterizations of fact, mischaracterizations of the litigation and its background, mischaracterizations of the benefits of the settlement to class members, omissions of material facts, and insufficient information to afford class members a basis upon which to evaluate the fairness of the settlement in light of all circumstances. The notice is incomprehensible to the average reader to whom it is directed. The notice is procedurally deficient because it was not designed to be distributed in a manner most likely to reach most class members. The class notice was designed to reach as few class members as possible, and to elicit a [sic] few objections or inquiries as possible from the class members that it did reach, all in the interest of preserving the proposed settlement against attack by classmembers. Moreover, the grounds for reconsideration and objections set forth in the "Amended Motion for Reconsideration of August 3, 1993 [sic] Order Approving Printed Notice, Summary Notice, and Their Distribution and Publication" heretofore filed with this Court and served on counsel to this case on August 19, 1993 are adopted by reference as additional grounds for this pleading.

12. The class certification and class settlement are premature because insufficient discovery has been

allowed by the Court as to the lawsuit merits, as to the propriety of class certification, as to the adequacy of the representation of the class by Class Counsel and the Class Representative, and as to the value and fairness of the settlement to the class members.

13. The class settlement should not be approved because Class Counsel, at the time such settlement was negotiated, represented certain individual policyholders and had sued Liberty National for fraud in connection with its cancer exchange program. Accordingly, Class Counsel may have been interested in insuring that Liberty National reserved sufficient assets and liquidity to satisfy any judgment or settlement in favor of those individual policyholders. Moreover, Class Counsel may have been interested in a class settlement that committed as little of Liberty National's assets as possible.

14. The class settlement ought not be approved because it provides inadequate monetary recovery to that sub-class of policyholders who have had cancer claims and provides for a measure of recovery that is inconsistent with law.

15. The class settlement ought not be approved because it provides no monetary recovery for the sub-class of cancer policyholders who have not had cancer, despite requiring them to release their fraud claims.

16. The class settlement ought not be approved because it treats classmembers differently than those policyholders who would be class members but for the fact that they filed suit on or before March 10, 1993, thus denying class members equal protection, equal treatment

and other statutory, common law, and constitutional rights.

17. The class settlement ought not be approved because it requires that all class members release all claims against Liberty National, Torchmark, their agents and others without adequate compensation and denies all class members their right to due process, a jury trial and other statutory, common law and constitutional rights by forcing them to accept the settlement proposal without any right to opt-out of the class.

18. The class settlement ought not be approved because the discovery and settlement negotiations were not conducted in a genuine, hard-fought, arms-length manner.

19. The class settlement ought not be approved because Class Counsel have refused class members access to information and have objected to and impeded the efforts of class members to secure discovery of information bearing upon the fairness of the settlement, the propriety of the certification of the class, and the adequacy of the representation of the class, and they have otherwise taken action contrary to the best interests of class members.

20. The class settlement ought not be approved because the amount of the settlement to be paid by Liberty National to class members is grossly unfair and insufficient, particularly in light of the compensatory damages suffered by the class members and the nature and extent of the scheme to trick and defraud that Liberty National practiced on 380,000 policyholders. Liberty National is to be relieved of substantial fraud claims and

damage liability for a nominal sum per fraudulent misrepresentation, and for no monetary compensation whatsoever for most class members.

21. The class settlement ought not be approved because the monetary relief awarded does not sufficiently punish Liberty National for its massive scheme to trick and defraud its cancer policyholders. The \$4 million contribution by Liberty National to settle 380,000 potential fraud claims amounts to the equivalent of one weeks' interest income for Liberty National, according to its annual report for 1992. Such contribution will not adequately punish a corporation with \$2.4 billion in assets (or deter others); nor would it adequately deter or punish Liberty National's parent corporation, which reported net income in excess of \$78 million in the second quarter of 1993.

22. The class settlement ought not be approved, because of the volume and nature of the objections interposed by class members.

23. The class settlement ought not be approved, because it fails to reasonably take into account the likelihood that the class and/or the individual class members would succeed on the merits of their individual cases, and the likely value of such success.

24. Liberty National has agreed not to object to payment of fees to Class Counsel in the amount of \$4.5 million. Objection is made to any award of attorney's fees without the necessary and proper foundation and proof. Moreover, objection is made to the said agreement not to object for the reason that, *inter alia*, Liberty National's said promise cannot avoid having the tendency to induce



Class Counsel to support the settlement; to the contrary, fees for Class Counsel should be set according to law after the fact.

25. The class settlement ought not be approved, because it requires the exculpation from liability of numerous potential defendants even though:

- (a) Such proposed releases are not parties to this action and never were;
- (b) No discovery has been allowed from, or even about, such proposed releasees and neither Class Counsel nor the Court has any basis to evaluate the enormity of any wrongs committed by, or the solvency of, any such proposed releasees;
- (c) No consideration has been or will be given by any of such proposed releasees for the valuable benefit of receiving compulsory general releases of not less than 380,000 causes of action in tort.

26. The Court should not award attorney's fees to Class Counsel, because discovery regarding those fees has been denied, and Class Counsel have not notified class members of any basis for any fee request and have thereby deprived class members of information upon which to evaluate such a request. The submission to be made by Class Counsel three days prior to the November 4, 1993 hearing will come too late to afford class members an adequate opportunity to receive, analyze, and respond to that information prior to the hearing.

27. The class settlement ought not be approved and the class should be decertified, because the discovery undertaken by Class Counsel (and the discovery allowed

to be conducted by Intervenor) is inadequate to ascertain: (a) whether or not the class should be certified and if so whether it should be certified as a 23(b)(2) class; (b) whether or not Class Counsel and the Class Representative has adequately represented and protected the interests of the class and the individual class members; (c) whether or not the settlement is fair, adequate, reasonable and in the best interests of the class and the individual class members; (d) the likelihood of success on the merits, and the value of the individual claims of class members; (e) what discovery previously was undertaken in the case, and what such discovery revealed; (f) the negotiations leading up to the settlement; (g) the extent to which the negotiations and discovery previously conducted were hard-fought, arms-length, and in good faith and comprehensive; (h) the likelihood of success on the merits; (i) the nature and scope of the fraud practiced by Liberty National; (j) the amounts paid by Liberty National to settle (or satisfy judgment in) other similar cases; and (k) the facts bearing upon the other issues as to which Intervenor sought discovery but were denied same.

28. The discovery that was ordered to be produced by Class Counsel in the form of documents and deposition transcripts was so conditioned by the Protective Order issued on September 9, 1993 as to unduly, unnecessarily, illegally and unconstitutionally hamper and restrict our counsel in his communications with us, in his representations of us and in his development of the facts and witnesses necessary to a fair and adequate development and presentation of the facts bearing on the issues presented in these proceedings. We adopt by reference



the grounds set forth in the "Objections To Protective Order Proposed By Liberty National And Motion To Enter Alternative Confidentiality Order" filed with the Court and served on counsel of record on September 1, 1993 as additional grounds for this pleading.

29. We do not wish to have our claims against Liberty National adjudicated in this class action. We specifically request that the Court permit us to opt out of this class pursuant to the Court's authority under Rule 23(d) of the *Alabama Rules of Civil Procedure*. We have been substantially damaged as a result of Liberty National's massive scheme to trick and defraud its cancer policyholders. We have lost money by paying increased premiums for coverage that was not as good as it was represented to be. We never would have paid these higher premiums if Liberty National had not misrepresented the quality of the coverage, suppressed the limitations on the coverage, misrepresented the true facts by misleading, inaccurate and incomplete comparison of the two policies, and/or represented to us that we had no choice but to drop the old policy and take the new one. We may now face [sic] the prospect of not being able to procure adequate cancer coverage elsewhere or incurring additional expense to procure cancer coverage from another insurer to replace the inadequate coverage fraudulently sold to us. We have suffered mental anguish and emotional distress at this prospect and at the prospect of incurring expenses for the treatment of cancer that were represented to be, but are not covered by our cancer policy. We are not interested in continuing as an insured of Liberty National under a "reformed" cancer policy; rather, we wish to present our fraud case to a jury and

ask the jury to award us compensatory and punitive damages against Liberty National Torchmark, and their agents. We are willing to accept the risk of failure of such claims before a jury. We believe that the verdict in such a case would be substantial; we are willing to accept the risk that the verdict in such a case might be very small or nothing at all. We believe the class settlement is a colossal effort by Liberty National to avoid the risk of a large number of such lawsuits, but we do not believe that the class relief offered by Liberty National can be constitutionally imposed on us under the circumstances.

30. We do not wish to present claims against Liberty National for declaratory or injunctive relief. Accordingly, we make the alternative averment (and wish to preserve the position) that we are not a member of the class as defined in this Court's March 10, 1993 Order and its later clarification of that class definition, said clarification having been issued by this Court on June 16, 1993.

31. We adopt by reference the grounds set forth in support of the "Motion For Relief From And/Or Clarification Of Order With Respect To Proposed Settlement" filed with this Court and served on counsel of record on June 25, 1993, as grounds for this pleading, including my positions stated herein: (a) that the class should not be certified; (b) that the injunction previously issued by the Court was improper and unconstitutional; (c) that the class settlement should not be approved; and (d) that I should be allowed to opt-out of the class.

32. We object to the reliance upon equitable remedies in the designation of the class and in the settlement of the claims, inasmuch as each class member has an adequate remedy at law.

33. We also hereby notice [sic] of my intention to appear and testify in these proceedings in order to fully and completely voice my objection and state my position in person.

34. We adopt every objection and every ground for objection filed or submitted by any other objector in respect of the proposed settlement of this, and in respect of the effort to resolve this on a class basis.

WHEREFORE, we object to the certification of any class; we object to the clarification of a Rule 23(b)(2) class; we object to the sufficiency of the class notice issued in this case; we object to the denial of discovery in this case; we object to the injunction issued in this case; we object to the class settlement proposed in this case; and we request that the Court permit us to opt out of the class certified in this case so that we can independently pursue our fraud and other claims against Liberty National, Torchmark, and their agents.

ARMBRECHT, JACKSON, DeMOUY,  
CROWE, HOLMES & REEVES  
P. O. Box 290  
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(205) 432-6751

By: /s/ W. Boyd Reeves  
W. BOYD REEVES

By: /s/ Norman E. Waldrop, Jr.  
NORMAN E. WALDROP, JR.

By: /s/ M. Kathleen Miller  
M. KATHLEEN MILLER

Attorneys for Objectors

#### CERTIFICATE OF SERVICE

I hereby certify that I have on this the 8th day of October, 1993, served a copy of the foregoing pleading upon:

Jere L. Beasley, Esquire  
Beasley, Wilson, Allen, Main & Crow, P.C.  
207 Montgomery Street  
10th Floor Bell Building  
Montgomery, Alabama 36104

James W. Gewin, Esquire  
Bradley, Arant, Rose & White  
1400 Park Place Tower  
2001 Park Place  
Birmingham, Alabama 35203

by depositing a copy of same in the United States mail, properly addressed and postage prepaid.

/s/ M. Kathleen Miller

IN THE CIRCUIT COURT  
OF BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLES FRANK ROBERTSON,	:	
for himself and in his	:	
representative capacity for the	:	
class of persons described herein,	:	CASE NUMBER
Plaintiff,	:	CV-92-021
vs.	:	
LIBERTY NATIONAL	:	
INSURANCE COMPANY,	:	
Defendant.	:	

OBJECTION TO CLASS CERTIFICATION, CLASS  
NOTICE, DENIAL OF DISCOVERY, ISSUANCE OF  
INJUNCTION AND CLASS SETTLEMENT, AND  
ALTERNATIVE REQUEST TO OPT OUT OF CLASS

I hereby object to the Certification of a Rule 23(b)(3) class in this matter, to the denial of discovery sought by intervenors, to the injunction issued by this Court on June 16, 1993, to the Class Notice served in August, 1993, and to the fairness of the proposed class settlement, and I hereby give notice of my intention to appear and testify at the fairness hearing scheduled to commence on November 4, 1993. Alternatively, I request that the Court permit me to opt out of the class heretofore certified in this litigation so that I can independently pursue my claims against the defendant and others for their fraud and other misconduct. My objection and alternative request are based upon the following:

1. I was insured under a cancer policy ("Old Policy") that was issued by Liberty National on or before August 29, 1986, and that provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and it was paid and in force (or in the grace period) on or after August 29, 1986. I was not a named plaintiff in any lawsuit against Liberty National filed on or before March 10, 1993 alleging fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National Cancer insurance policies. My "old policy" did not lapse prior to August 29, 1986. My first Liberty National cancer policy was not a new policy form issued after August 29, 1986. The issue date of my Liberty National Old Policy was May 17, 1976. I was thereafter induced to replace this policy with a new Liberty National cancer policy ("New Policy"), which became effective on August 1, 1988. I was induced to agree to this replacement (i) by misrepresentation that the New Policy was better than the Old Policy, (ii) by the suppression of the fact that the New Policy contained substantial limitations upon expenses incurred for chemotherapy, radiation therapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, (iii) by an incomplete, inaccurate and misleading comparison of the terms, conditions or benefits contained in the Old Policy and the New Policy; and/or (iv) by misrepresentations that the Old Policy was no longer available and that I was required to switch to the New Policy. I understand that the misrepresentation made to



me were part of a pattern of intentional wrongful conduct carried out by Liberty National and others.

2. The class was improperly certified in this case because the claims of Charlie Frank Robertson are not typical of the claims of the other class members.

3. The class was improperly certified in this case because the claims of Charlie Frank Robertson are not common to all class members.

4. The class was improperly certified in this case because Charlie Frank Robertson is not an adequate representative of the interests of class members.

5. The class was improperly certified because the requirements of Rule 23(a), Alabama Rules of Civil Procedure, have not been shown to have been met.

6. The class was improperly certified because this action, and/or the claims Class Counsel have attempted to compromise, are not primarily injunctive in nature.

7. The class was improperly certified because the party "opposing" the class, defendant, and other parties proposed to be exculpated by the proposed settlement herein, have not acted or refused to act on grounds generally applicable to the class.

8. In support of my position that the class should not be certified, the settlement should not be approved and that I should be allowed to opt out of the class I adopt by reference all grounds set forth in sections A, B and C of the Intervention Petition and Motion to Amend Intervention Petition filed with this Court and served on counsel of record on June 10, 1993 and June 25, 1993, respectively, as additional grounds for this pleading.

9. Class Counsel have not acted in the best interests of the class members, they represent class members who have different and conflicting interests, have not acted competently in respect of the interests of the class members, and have otherwise not adequately represented the best interests of the class members.

10. Class Counsel participated in the defining of the class in such a fashion as to permit them to file independent fraud suits for certain of their clients against Liberty National (*i.e.*, suits filed on or before May 10, 1993 are not precluded by the class action), providing those clients with the equivalent of "opt-out" rights not provided to the remainder of the class. Those clients then elected (through their counsel) to opt-out by filing suits against Liberty National on or before March 10, 1993. Although some of these claims were later dismissed without prejudice, the filing of such action afforded all such plaintiffs a right to elect to opt into or out of the class, a right not enjoyed by other class members. Some such claims remain pending, and the dismissed claims may have been settled. Such action constitutes an acknowledgment that pursuit of individual claims, not participation in the class action and its proposed settlement, is in the best interests of class members.

11. The class notice approved by the Court and sent to class members is misleading, inadequate and insufficient. The notice contains misstatements/mischaracterizations of fact, mischaracterizations of the litigation and its background, mischaracterizations of the benefits of the settlement to class members, omissions of material facts, and insufficient information to afford class members a

basis upon which to evaluate the fairness of the settlement in light of all circumstances. The notice is incomprehensible to the average reader to whom it is directed. The notice is procedurally deficient because it was not designed to be distributed in a manner most likely to reach most class members. The class notice was designed to reach a few class members as possible, and to elicit as few objections or inquiries as possible from the class members that it did reach, all in the interest of preserving the proposed settlement against attack by class members. Moreover, the grounds for reconsideration and objections set forth in the "Amended Motion For Reconsideration of August 3, 1993 [sic] Order Approving Printed Notice, Summary Notice, And Their Distribution And Publication" heretofore filed with this Court and served on counsel to this case on August 19, 1993 are adopted by reference as additional grounds for this pleading.

12. The class certification and class settlement are premature because insufficient discovery has been allowed by the Court as to the lawsuit merits, as to the propriety of class certification, as to the adequacy of the representation of the class by Class Counsel and the Class Representative, and as to the value and fairness of the settlement to the class members.

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satisfy and judgment or settlement in favor of those individual policyholders. Moreover, Class Counsel may have been interested in a class settlement that committed as little of Liberty National's assets as possible.

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16. The class settlement ought not be approved because it treats class members differently than those policyholders who would be class members but for the fact that they filed suit on or before March 10, 1993, thus denying class members equal protection, equal treatment and other statutory, common law, and constitutional rights.

17. The class settlement ought not be approved because it requires that all class members release all claims against Liberty National, Torchmark, their agents and others without adequate compensation and denies all class members their right to due process, a jury trial and other statutory, common law and constitutional rights by forcing them to accept the settlement proposal without any right to opt-out of the class.

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not conducted in a genuine, hard-fought, arms-length manner.

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20. The class settlement ought not be approved because the amount of the settlement to be paid by Liberty National to class members is grossly unfair and insufficient, particularly in light of the compensatory damages suffered by the class members and the nature and extent of the scheme to trick and defraud that Liberty National practiced on 380,000 policyholders. Liberty National is to be relieved of substantial fraud claims and damage liability for a nominal sum per fraudulent misrepresentation, and for no monetary compensation whatsoever for most class members.

21. The class settlement ought not be approved because the monetary relief awarded does not sufficiently punish Liberty National for its massive scheme to trick and defraud its cancer policyholders. The \$4 million contribution by Liberty National to settle 380,000 potential fraud claims amounts to the equivalent of one week's interest income for Liberty National, according to its annual report for 1992. Such contribution will not adequately punish a corporation with \$2.4 billion in assets

(or deter others); nor would it adequately deter or punish Liberty National's parent corporation, which reported net income in excess of \$78 million in the second quarter of 1993.

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wrongs committed by, or the solvency of, any such proposed releasees;

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case, and what such discovery revealed; (f) the negotiations leading up to the settlement; (g) the extent to which the negotiations and discovery previously conducted were hard-fought, arms-length, and in good faith and comprehensive; (h) the likelihood of success on the merits; (i) the nature and scope of the fraud practiced by Liberty National; (j) the amounts paid by Liberty National to settle (or satisfy judgment in) other similar cases; and (k) the facts bearing upon the other issues as to which Intervenor sought discovery but were denied same.

28. The discovery that was ordered to be produced by Class Counsel in the form of documents and deposition transcripts was so conditioned by the Protective Order issued on September 9, 1993 as to unduly, unnecessarily, illegally and unconstitutionally hamper and restrict my counsel in his communications with me, in his representation of me and in his development of the facts and witnesses necessary to a fair and adequate development and presentation of the facts bearing on the issues presented in these proceedings. Moreover, I adopt by reference the grounds set forth in the "Objections To Protective Order Proposed By Liberty National And Motion To Enter Alternative Confidentiality Order" filed with the Court and served on counsel of record on September 1, 1993 as additional grounds for this pleading.

29. I do not wish to have my claims against Liberty National adjudicated in this class action. I specifically request that the Court permit me to opt out of this class pursuant to the Court's authority under Rule 23(d) of the *Alabama Rules of Civil Procedure*. I have been substantially damaged as a result of Liberty National's massive scheme

to trick and defraud its cancer policyholders. I have lost money by paying increased premiums for coverage that was not as good as it was represented to be. I never would have paid these higher premiums if Liberty National had not misrepresented the quality of the coverage, suppressed the limitations on the coverage, misrepresented the true facts by misleading, inaccurate and incomplete comparison of the two policies, and/or represented to me that I had no choice but to drop the old policy and take out the new one. I may now face the prospect of not being able to procure adequate cancer coverage elsewhere or incurring additional expense to procure cancer coverage from another insurer to replace the inadequate coverage fraudulently sold to me. I have suffered mental anguish and emotional distress at this prospect and at the prospect of incurring expenses for the treatment of cancer that were represented to be, but are not, covered by my cancer policy. I am not interested in continuing as an insured of Liberty National under a "reformed" cancer policy; rather, I wish to present my fraud case to jury and ask the jury to award me compensatory and punitive damages against Liberty National, Torchmark, and their agents. I am willing to accept the risk of failure of such claims before a jury. I believe that the verdict in such a case would be substantial; I am willing to accept the risk that the verdict in such a case might be very small or nothing at all. I believe the class settlement is a colossal effort by Liberty National to avoid the risk of a large number of such lawsuits, but I do not believe that the class relief offered by Liberty National can be constitutionally imposed on me under the circumstances.

30. I do not wish to present claims against Liberty National for declaratory or injunctive relief. Accordingly, I make the alternative averment (and wish to preserve the position) that I am not a member of the class as defined in this Court's March 10, 1993 Order and its later clarification of that class definition, said clarification having been issued by this Court on June 16, 1993.

31. I adopt by reference the grounds set forth in support of the "Motion For Relief From And/Or Clarification Of Order With Respect To Proposed Settlement" filed with this Court and served on counsel of record on June 25, 1993, as grounds for this pleading, including my positions stated herein: (a) that the class should not be certified; (b) that the injunction previously issued by the Court was improper and unconstitutional; (c) that the class settlement should not be approved; and (d) that I should be allowed to opt-out of the class.

32. I object to the reliance upon equitable remedies in the designation of the class and in the settlement of the claims, inasmuch as each class member has an adequate remedy at law.

33. I also hereby give notice of my intention to appear and testify in these proceedings in order to fully and completely voice my objection and state my position in person.

34. I adopt every objection and every ground for objection filed or submitted by any other objector in respect of the proposed settlement of this, and in respect of the effort to resolve this on a class basis.

35. A true and complete copy of my affidavit is attached hereto as Exhibit "A".

WHEREFORE, I object to the certification of any class; I object to the certification of a Rule 23(b)(2) class; I object to the sufficiency of the class notice issued in this case; I object to the denial of discovery in this case; I object to the injunction issued in this case; I object to the class settlement proposed in this case; and I request that the Court permit me to opt out of the class certified in this case so that I can independently pursue my fraud and other claims against Liberty National, Torchmark, and their agents.

/s/ Lillie N. Chunn  
LILLIE N. CHUNN,  
OBJECTOR

/s/ Bill Roedder  
WILLIAM C. ROEDDER  
W. ALEXANDER MOSELEY  
GEORGE M. WALKER  
Attorneys for Objector

OF COUNSEL:

HAND, ARENDALL, BEDSOLE,  
GREAVES & JOHNSTON  
3000 First National Bank Building  
Post Office Box 123  
Mobile, Alabama 36601  
(205) 432-5511

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on each of the following by mailing a copy of

the same by United States mail, postage prepaid and properly addressed, on this day, 8th Oct. 1993.

/s/ Bill Roedder

COUNSEL OF RECORD:

Jere L. Beasley, Esquire  
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James W. Gewin, Esquire  
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Birmingham, Alabama 35203

EXHIBIT A

IN THE CIRCUIT COURT  
OF BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON,	:	
for himself and in his	:	
representative capacity for the	:	
class of persons described herein,	:	CASE NO.
Plaintiff,	:	CV-92-021
vs.	:	
LIBERTY NATIONAL LIFE	:	
INSURANCE COMPANY,	:	
Defendant.	:	



AFFIDAVIT

STATE OF ALABAMA )

COUNTY OF MOBILE )

BEFORE ME, the undersigned notary public in and for said county and state, personally appeared Lillie N. Chunn, who, being known to me and being by me first duly sworn, did depose and say the following:

1. My name is Lillie N. Chunn, and I reside in Malcolm, Alabama. I am seventy three (73) years old and competent to make this affidavit. I have a ninth grade education, and I am the owner and proprietor of Bate's Bait Shop. I have no work experience in the insurance industry. The following information is based on my personal knowledge except to the extent indicated.

2. I have retained the law firm of Hand, Arendall, Bedsole, Greaves & Johnston to represent me with my claim against Liberty National Life Insurance Company ("Liberty National"), Liberty National sales agent, Robert B. Evans ("Evans"), and others.

3. In or about July, 1988, Mr. Evans contacted me about my old Liberty National cancer policy and a new Liberty National cancer policy. Mr. Evans made oral misrepresentations to me concerning the coverage under these policies, and he failed to disclose considerable important information about the coverages. In reliance on those misrepresentations and non-disclosures, I purchased the new Liberty National cancer policy. I had to pay higher premiums under the new policy and did so based on the misrepresentations and non-disclosures. My premiums have further increased since that time.

4. As regards all of the cancer insurance I have taken out with Liberty National, I have done so because of the fear of having to pay high medical bills with my limited financial resources. I have relied and depended on Liberty National to be a reputable company and to deal with me fairly and honestly. I was extremely disturbed and distressed to learn that I was misled, and that I no longer have the type of cancer coverage that my old policy provided.

5. I now understand that I may be a member of a mandatory class in the class action filed against Liberty National in Barbour County, Case No. CV-92-021. ("Barbour County Litigation").

6. I further understand that I am enjoined and prohibited from commencing or prosecuting any action, in any capacity, asserting any claims which are proposed to be released pursuant to the proposed settlement in the Barbour County Litigation.

7. I did not receive the papers entitled Notice of the Pendency of Action, Class Action Determination, Settlement and Settlement Hearing of the Barbour County Litigation in the mail from Liberty National. However, I did obtain a copy of these papers from my Hand, Arendall attorney. I have tried to read them but I have no idea of the message that these papers intend to convey.

8. Class Counsel in the Barbour County Litigation have never contacted me to consult with me regarding the proposed settlement. Nor have they contacted me about the injunction proceedings. They have never asked me about my claims against Liberty National, the damage that I have suffered, the actions that I have taken in

reliance on the oral representations that were made to me by Mr. Evans, or the circumstances of those representations. In fact, Class Counsel have not contacted me at any time about any thing.

9. I do not want to be a party to or to be bound by the settlement agreement proposed by Class Counsel and counsel for Liberty National. Nor do I want to be represented by Class Counsel. I want to seek compensatory and punitive damages in my own independent action, against Mr. Evans, Liberty National, and others, in a forum that is proper and convenient for me. Through my own counsel, I want to pursue my claim in Mobile County, and I want my case to be heard by a jury.

Further deponent sayeth not.

/s/ Lillie N. Chunn  
Lillie N. Chunn

Sworn to and subscribed before me this 24th day of September, 1993.

/s/ Lynn O. Binet  
NOTARY PUBLIC  
My Commission expires:  
10-16-95

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, \*  
for himself, and in his \*  
representative capacity for the \*  
class of persons described herein, \*  
Plaintiff, \*

vs. \*

LIBERTY NATIONAL LIFE \*  
INSURANCE COMPANY, \*  
Defendant. \*

CASE NO.  
CV-92-021

OBJECTION TO CLASS CERTIFICATION, CLASS  
NOTICE, DENIAL OF DISCOVERY, ISSUANCE OF  
INJUNCTION AND CLASS SETTLEMENT, AND  
ALTERNATIVE REQUEST TO OPT OUT OF CLASS

(Filed October 8, 1993)

I/We hereby object to the Certification of a Rule 23(b)(3) class in this matter, to the denial of discovery sought by intervenors, to the injunction issued by this Court on June 16, 1993, to the Class Notice served on or about August 15, 1993, and to the fairness of the proposed class settlement, and I/We hereby give notice of my/our intention to appear and testify at the fairness hearing scheduled to commence on November 4, 1993. Alternatively, I/we request that the Court permit me/us to opt out of the class heretofore certified in this litigation so that I/we can independently pursue my/our claims against the defendant and others for their fraud and

other misconduct. My/our objection and alternative request are based upon the following:

1. I/We (were) was insured under a cancer policy ("Old Policy") that was issued by Liberty National on or before August 29, 1986, and that provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and was paid and in force (or in the grace period) on or after August 29, 1986. I/We (were) was not a named plaintiff in any lawsuit against Liberty National filed on or before March 10, 1993 alleging fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies. My/Our "old policy" did not lapse prior to August 29, 1986. My/Our first Liberty National cancer policy was not a new policy form issued after August 29, 1986. The issue date of my Liberty National Old Policy was prior to August 29, 1986. I/We (were) was thereafter induced to replace this policy with a new Liberty National cancer policy ("New Policy"), which became effective after August 29, 1986. I/We (were) was induced to agree to this replacement (i) by misrepresentation that the New Policy was better than the Old Policy, (ii) by the suppression of the fact that the New Policy contained substantial limitations upon expenses incurred for chemotherapy, radiation therapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, (iii) by an incomplete, inaccurate and misleading comparison of the terms, conditions or benefits contained in the Old Policy and the New Policy; and/or (iv) by misrepresentations that the Old Policy was no longer

available and that I/we (were) was required to switch to the New Policy. I/We understand that the misrepresentations made to me/us (were) was part of a pattern of intentional wrongful conduct carried out by Liberty National and others.

2. The class was improperly certified in this case because the claims of Charlie Frank Robertson are not typical of the claims of the other class members.

3. The class was improperly certified in this case because the claims of Charlie Frank Robertson are not common to all class members.

4. The class was improperly certified in this case because Charlie Frank Robertson is not an adequate representative of the interests of class members.

5. The class was improperly certified because the requirements of Rule 23(a), Alabama Rules of Civil Procedure, have not been shown to have been met.

6. The class was improperly certified because this action, and/or the claims Class Council [sic] have attempted to compromise, are not primarily injunctive in nature.

7. The class was improperly certified because the party "opposing" the class, defendant, and other parties proposed to be exculpated by the proposed settlement herein, have not acted or refused to act on grounds generally applicable to this class.

8. In support of my/our position that the class should not be certified, the settlement should not be approved and that I/we should be allowed too [sic] opt out of the class I/we adopt by reference all grounds set



forth in sections A, B and C of the Intervention Petition and Motion to Amend Intervention Petition filed with this Court and served on counsel of record on June 10, 1993 and June 25, 1993, respectively, as additional grounds for this pleading.

9. Class Counsel have not acted in the best interests of the class members, they represent class members who have different and conflicting interests, have not acted competently in respect of the interests of the class members, and have otherwise not adequately represented the best interests of the class members.

10. Class Counsel participated in the defining of the class in such a fashion as to permit them to file independent fraud suits for certain of their clients against Liberty National (*i.e.*, suits filed on or before March 10, 1993 are not precluded by the class action), providing those clients with the equivalent of "opt-out" rights not provided to the remainder of the class. Those clients then elected (through their counsel) to opt-out by filing suits against Liberty National on or before March 10, 1993. Although some of these claims were later dismissed without prejudice, the filing of such action afforded all such plaintiffs a right to elect to opt into or out of the class, a right not enjoyed by other class members. Some such claims remain pending, and the dismissed claims may have been settled. Pertinent parts of these records will be submitted to the Court. Such action constitutes an acknowledgment that pursuit of individual claims, not participation in the class action and its proposed settlement, is in the best interests of class members.

11. The class notice approved by the Court and sent to class members is misleading, inadequate and insufficient. The notice contains misstatements/mischaracterizations of fact, mischaracterizations of the litigation and its [sic] background, mischaracterizations of the benefits of the settlement to class members, omissions of material facts, and insufficient information to afford class members a basis upon which to evaluate the fairness of the settlement in light of all circumstances. The notice is incomprehensible to the average reader to whom it is directed. The notice is procedurally deficient because it was not designed to be distributed in a manner most likely to reach most class members. The class notice was designed to reach as few class members as possible, and to elicit as few objections or inquiries as possible from the class members that it did reach, all in the interest of preserving the proposed settlement against attack by class members. Moreover, the grounds for reconsideration and objections set forth in the "Amended Motion For Reconsideration Of August 3, 1993 Order Approving Printed Notice, Summary Notice, And Their Distribution And Publication" heretofore filed with this Court and served on counsel to this case on August 19, 1993 are adopted by reference as additional grounds for this pleading.

12. The class certification and class settlement are premature because insufficient discovery has been allowed by the Court as to the lawsuit merits, as to the propriety of class certification, as to the adequacy of the representation of the class by Class Counsel and the Class Representative, and as to the value and fairness of the settlement to the class members.

13. The class settlement should not be approved because Class Counsel, at the time such settlement was negotiated, represented certain individual policyholders and had sued Liberty National for fraud in connection with its cancer exchange program. Accordingly, Class Counsel may have been interested in insuring that Liberty National reserved sufficient assets and liquidity to satisfy any judgment or settlement in favor of those individual policyholders. Moreover, Class Counsel may have been interested in a class settlement that committed as little of Liberty National's assets as possible.

14. The class settlement ought not be approved because it provides inadequate monetary recovery to that sub-class of policyholders who have had cancer claims and provides for a measure of recovery that is inconsistent with law.

15. The class settlement ought not be approved because it provides no monetary recovery for the sub-class of cancer policyholders who have not had cancer, despite requiring them to release their fraud claims.

16. The class settlement ought not be approved because it treats class members differently than those policyholders who would be class members but for the fact that they filed suit on or before March 10, 1993, thus denying class members equal protection, equal treatment and other statutory, common law, and constitutional rights.

17. The class settlement ought not be approved because it requires that all class members release all claims against Liberty National, Torchmark, their agents and others without adequate compensation and denies all

class members their right to due process, a jury trial and other statutory, common law and constitutional rights by forcing them to accept the settlement proposal without any right to opt-out of the class.

18. The class settlement ought not be approved because the discovery and settlement negotiations were not conducted in a genuine, hard-fought, arms-length manner.

19. The class settlement ought not be approved because Class Counsel have refused class members access to information and have objected to and impeded the efforts of class members to secure discovery of information bearing upon the fairness of the settlement, the propriety of the certification of the class, and the adequacy of the representation of the class, and they have otherwise taken action contrary to the best interests of class members.

20. The class settlement ought not be approved because the amount of the settlement to be paid by Liberty National to class members is grossly unfair and insufficient, particularly in light of the compensatory damages suffered by the class members and the nature and extent of the scheme to trick and defraud that Liberty National practiced on 380,000 policyholders. Liberty National is to be relieved of substantial fraud claims and damage liability for a nominal sum per fraudulent misrepresentation, and for no monetary compensation whatsoever for most class members.

21. The class settlement ought not be approved because the monetary relief awarded does not sufficiently punish Liberty National for its massive scheme to trick



and defraud its cancer policyholders. The \$4 million contribution by Liberty National to settle 380,000 potential fraud claims amounts to the equivalent of one weeks' interest income for Liberty National, according to its annual report for 1992. Such contribution will not adequately punish a corporation with \$2.4 billion in assets (or deter others); nor would it adequately deter others or punish Liberty National's parent corporation, which reported net income in excess of \$78 million in the second quarter of 1993. Pertinent parts of these records will be submitted to the Court.

22. The class settlement ought not be approved, because of the volume and nature of the objections interposed by class members.

23. The class settlement ought not be approved, because it fails to reasonably take into account the likelihood that the class and/or the individual class members would succeed on the merits of their individual cases, and the likely value of such success.

24. Liberty National has agreed not to object to payment of fees to Class Counsel in the amount of \$4.5 million. Objection is made to any award of attorney's fees without the necessary and proper foundation and proof. Moreover, objection is made to the said agreement not to object for the reason that, inter alia, Liberty National's said promise cannot avoid having the tendency to induce Class Counsel to support the settlement; to the contrary, fees for Class Counsel should be set according to law after the fact.

25. The class settlement ought not be approved, because it requires the exculpation from liability of numerous potential defendants even though:

- (a) Such proposed releasees are not parties to this action and never were;
- (b) No discovery has been allowed from, or even about, such proposed releasees and neither Class Counsel nor the Court has any basis to evaluate the enormity of any wrongs committed by, or the solvency of, any such proposed releasees;
- (c) No consideration has been or will be given by any of such proposed releasees for the valuable benefit of receiving compulsory general releases of not less than 380,000 causes of action in tort.

26. The Court should not award attorney's fees to Class Counsel, because discovery regarding those fees has been denied, and Class Counsel have not notified class members of any basis for any fee request and have thereby deprived class members of information upon which to evaluate such a request. The submission to be made by Class Counsel three days prior to the November 4, 1993 hearing will come too late to afford class members an adequate opportunity to receive, analyze, and respond to that information prior to the hearing.

27. The class settlement ought not be approved and the class should be decertified, because the discovery undertaken by Class Counsel (and the discovery allowed to be conducted by Intervenor) is inadequate to ascertain: (a) whether or not the class should be certified and if so whether it should be certified as a 23(b)(2) class; (b)



whether or not Class Counsel and the Class Representative has [sic] adequately represented and protected the interests of the class and the individual class members; (c) whether or not the settlement is fair, adequate, reasonable and in the best interests of the class and the individual class members; (d) the likelihood of success on the merits, and the value of the individual claims of class members; (e) what discovery previously was undertaken in the case, and what such discovery revealed; (f) the negotiations leading up to the settlement; (g) the extent to which the negotiations and discovery previously conducted were hard-fought, arms-length, and in good faith and comprehensive; (h) the likelihood of success on the merits; (i) the nature and scope of the fraud practiced by Liberty National; (j) the amounts paid by Liberty National to settle (or satisfy judgment in) other similar cases; and (k) the facts bearing upon the other issues as to which Intervenors sought discovery but were denied same.

28. The discovery that was ordered to be produced by Class Counsel in the form of documents and deposition transcripts was so conditioned by the Protective Order issued on September 9, 1993 as to unduly, unnecessarily, illegally and unconstitutionally hamper and restrict my/our counsel in his communications with me, in his representation of me and in his development of the facts and witnesses necessary to a fair and adequate development and presentation of the facts bearing on the issues presented in these proceedings. Moreover, I/we adopt by reference the grounds set forth in the "Objections To Protective Order Proposed By Liberty National And Motion To Enter Alternative Confidentiality Order"

filed with the Court and served on counsel of record on September 1, 1993 as additional grounds for this pleading.

29. I/We (are) am a resident(s) of the State of Mississippi and I/we contest the jurisdiction of this Alabama court, and this venue, to bind me/us. The misrepresentations were made to me/us in Mississippi, and the policy was delivered to me/us in Mississippi. Liberty National could not use the class action vehicle in Mississippi because class actions are not recognized under Mississippi law. Therefore, Liberty National cannot obtain the release of my/our claims by an Alabama class action.

30. I/We do not wish to have my/our claims against Liberty National adjudicated in this class action. I/We specifically request that the Court permit me/us to opt out of this class pursuant to the Court's authority under Rule 23(d) of the *Alabama Rules of Civil Procedure*. I/We have been substantially damaged as a result of Liberty National's massive scheme to trick and defraud its cancer policyholders. I/We have lost money by paying increased premiums for coverage that was not as good as it was represented to be. I/We never would have paid these higher premiums if Liberty National had not misrepresented the quality of the coverage, suppressed the limitations on the coverage, misrepresented the true facts by misleading, inaccurate and incomplete comparison of the two policies, and/or represented to me/us that I/we had no choice but to drop the old policy and take out the new one. I/We may now face the prospect of not being able to procure adequate cancer coverage elsewhere or incurring additional expense to procure cancer coverage from another insurer to replace the inadequate coverage

fraudulently sold to me/us. I/We have suffered mental anguish and emotional distress at this prospect and at the prospect of incurring expenses for the treatment of cancer that were represented to be, but are not, covered by my/our cancer policy. I/We (are) am not interested in continuing as an insured of Liberty National under a "reformed" cancer policy; rather, I/we wish to present my/our fraud case to a jury and ask the jury to award me/us compensatory and punitive damages against Liberty National, Torchmark, and their agents. I/We (are) am willing to accept the risk of failure of such claims before a jury. I/We believe that the verdict in such a case would be substantial; I/We (are) am willing to accept the risk that the verdict in such a case might be very small or nothing at all. I/We believe the class settlement is a colossal effort by Liberty National to avoid the risk of a large number of such lawsuits, but I/we do not believe that the class relief offered by Liberty National can be constitutionally imposed on me/us under the circumstances.

31. I/We do not wish to present claims against Liberty National for declaratory or injunctive relief. Accordingly, I/we make the alternative averment (and wish to preserve the position) that I/we (are) am not a member of the class as defined in this Court's March 10, 1993 Order and its later clarification of that class definition, said clarification having been issued by this Court on June 16, 1993.

32. I/We adopt by reference the grounds set forth in support of the "Motion For Relief From And/Or Clarification Of Order With Respect To Proposed Settlement"

filed with this Court and served on counsel of record on June 25, 1993, as grounds for this pleading, including my positions stated herein: (a) that the class should not be certified; (b) that the injunction previously issued by the Court was improper and unconstitutional; (c) that the class settlement should not be approved; and (d) that I/we should be allowed to opt-out of the class.

33. I/We also hereby give notice of my/our intention to appear and testify in these proceedings in order to fully and completely voice my/our objection and state my/our positions in person.

**WHEREFORE**, I/we object to the certification of any class, I/we object to the certification of a Rule 23(b)(2) class; I/we object to the sufficiency of the class notice issued in this case; I/we object to the denial of discovery in this case; I/we object to the injunction issued in this case; I/we object to the class settlement proposed in this case; and I/we request that the Court permit me/us to opt out of the class certified in this case so that I/we can independently pursue my/our own fraud and other claims against Liberty National, Torchmark, and their agents.

---

**OBJECTOR**

---

**OBJECTOR**

Sworn to and subscribed before  
me this \_\_\_\_ day of \_\_\_\_, 1993.

---

**NOTARY PUBLIC**

/s/ John D. Richardson  
**JOHN D. RICHARDSON**  
**DAVID F. DANIELL**  
**Attorneys for Objectors**  
 David L. Lynd, Elizabeth S.  
 Lynd, Pat DeSantis, Angela  
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 Margaret Beech, Donald  
 Rayford Williams, Olga N.  
 Williams, Mickie E. Ray,  
 Willie J. Ray, Albert E. Ray,  
 Cora Q. Ray, and Patrick Ray,  
 Donald L. Allen, Mary J.  
 Allen, William A. Barnes,  
 Alma G. Barnes, Grace Bion-  
 dolillo, Sallie M. Conway,  
 Deborah M. Cox, Tommy R.  
 Cox, Della M. Finlay, Lore M.  
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 Daisy D. Howell, Lucille J.  
 Jackson, Theodore W. Jock-  
 isch, Francis L. Jockisch, Lois  
 N. Klaas, Phillip Bruce Lump-  
 kin, Gloria W. Lumpkin,  
 Floyd J. Miller, Annie G. Mil-  
 ler, James E. Mitchener, Sr.,  
 Sally F. Mitchener, Hubert R.  
 Odom, Catherine J. Odom,

Thomas Wayne Smith, Sue  
 Ann Smith, Warren G. Stan-  
 ley, Jr., Vicki H. Stanley,  
 Norris F. Woodard, Lois M.  
 Woodard, James E. Wooley,  
 Linda C. Wooley, Ashton B.  
 Cannon, Carolyn Cannon,  
 Leslie C. Collings, Edna W.  
 Collings, Lottie Trest, William  
 C. Trest, William D. Knapp,  
 Ruby Knapp, Ruby Walker,  
 Jaime Phillips, Augustus L.  
 Smith, Patricia L. Smith,  
 Donald E. Smith, Karen K.  
 Smith, David A. Rose, Sr.,  
 Kay I. Rose, Essie Lee Taylor,  
 Henry D. Whigham, Gloria  
 Whigham, Ruby M. Taylor,  
 Hiram R. Burge, William C.  
 Smith, Jean M. Smith, Gail  
 Pruitt, Bennie F. Baker,  
 Gladys R. Baker, Julian Ted-  
 der, Betty B. Tedder, Joann B.  
 Voivedich, Raymond Guy,  
 Deborah Guy, Wyone Guy,  
 Charles R. Gilbert, Delores M.  
 Gilbert, Susan Trest Price,  
 Rayford Hinton, Jr., Judith C.  
 Hinton, Robert Vanek, Telecia  
 Paulk (f/n/a) Telecia Gibbs,  
 James P. Cazalas, Sr., Brenda  
 S. Cazalas, Leo C. Crain,  
 Sandra E. Crain, William T.  
 Beasley, Jesse M. Turner,  
 Hugh F. McCoy, Byron D.  
 Ray, Jr., Lynn M. Ray and Jo-  
 seph H. Lofton.



## OF COUNSEL:

**RICHARDSON, DANIELL, SPEAR & UPTON, P.C.**  
 Post Office Box 16428  
 Mobile, Alabama 36616  
 (205) 344-8181

CERTIFICATE OF SERVICE

I do hereby certify that I have, on this 8 day of     1993, served a copy of the foregoing pleading on counsel of record for all parties to this proceeding, by placing same in the United States mail, properly addressed and first class postage.

/s/ John D. Richardson

COUNSEL OF RECORD:

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 Beasley, Wilson, Allen,  
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 Bradley, Arant, Rose & White  
 1400 Park Place Tower  
 2001 Park Place  
 Birmingham, AL 35203

/s/ Lois M. Woodard  
**OBJECTOR**

/s/ Norris F. Woodard  
**OBJECTOR**

Sworn to and subscribed before  
 me this 30 day of Sept., 1993.

/s/ Donald F. Byrd  
**NOTARY PUBLIC**

NOTARY PUBLIC STATE OF  
 MISSISSIPPI AT LARGE.  
 MY COMMISSION EXPIRES:  
 Jan. 13, 1996.  
 BONDED THRU NOTARY  
 PUBLIC UNDERWRITERS.

---

**JOHN D. RICHARDSON**  
**DAVID F. DANIELL**  
**Attorneys for Objectors**  
 David L. Lynd, Elizabeth S. Lynd,  
 Pat DeSantis, Angela DeSantis,  
 James V. Stowe, Wilma S. Stowe,  
 Juantia R. Stowe, Richard J. Hoss,  
 Linda H. Hoss, Wesley R. Beech,  
 Sr., Margaret Beech, Donald  
 Rayford Williams, Olga N. Wil-  
 liams, Mickie E. Ray, Willie J. Ray,  
 Albert E. Ray, Cora Q. Ray, and  
 Patrick Ray, Donald L. Allen,

---

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, \*  
for himself, and in his \*  
representative capacity for the \*  
class of persons described \*  
herein, \*

CASE NO.  
CF-92-021

Plaintiff, \*

vs. \*

LIBERTY NATIONAL LIFE \*  
INSURANCE COMPANY, \*

Defendant. \*

---

NOTICE OF OPT OUT

(Filed November 8, 1993)

---

Norris and Lois Woodard, resident citizens of the state of Mississippi, exercise their procedural due process rights set forth by the United States Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L. Ed 688, 105 S. Ct. 2965 (1985) and opt out of this class action.

Respectfully submitted,  
Norris Woodard and  
Lois Woodard  
BY ATTORNEYS FOR PLAINTIFFS

/s/ David F. Daniell  
DAVID F. DANIELL  
RICHARDSON, DANIELL,  
SPEAR & UPTON, P.C.

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---

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(205) 344-8181

CERTIFICATE OF SERVICE

I do hereby certify that I have, on this 5 day of Nov. , 1993, served a copy of the foregoing pleading on counsel of record for all parties to this proceeding, by placing same in the United States mail, properly addressed and first class postage.

/s/ David F Daniell

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William C. Roedder, Esq.  
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3000 First National Bank Building  
Post Office Box 123  
Mobile, Alabama 36601

IN THE CIRCUIT COURT  
OF BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISON [sic]

CHARLIE FRANK ROBERTSON,	)	
for himself, and in his	)	
representative capacity for the	)	
class of persons described herein,	)	CASE NO.
Plaintiff,	)	CV-92-021
	)	
vs	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

MOTION TO OPT OUT OR, IN THE ALTERNATIVE,  
OBJECTION TO CLASS CERTIFICATION  
AND/OR THE PROPOSED SETTLEMENT

(Filed January 19, 1994)

The following individuals, who own Liberty National cancer policies, file their Motion to Opt Out or, in the Alternative, Objection to Class Certification and/or the Proposed Class Settlement, as follows:

1. This motion is brought on behalf of the following Liberty National cancer policy holders: **Glenn and Margie Perkins**.
2. The foregoing, for whom this motion and objection is brought, are hereinafter referred to as either "Movants" or "Objectors".
3. In the late 1970s and early 1980s, Liberty National issued cancer insurance policies (hereinafter "old policies") to Movants which were guaranteed annual renewable and which provided unlimited coverage for



radiation, chemotherapy, prescription chemotherapy drugs, and other out of hospital prescription drugs. Defendant thereafter induced Movants to replace their cancer policies with a new type of policy by misrepresentations that the new policy was better than the old; by concealment of facts that the new policy reduced the benefits available for radiation, chemotherapy, prescription chemotherapy drugs, and other out of hospital drugs; by incomplete, inaccurate and misleading comparisons of the terms, conditions or benefits in the old policy and the new policy; and/or by misrepresentations that the old policy was no longer available and they were required to switch to the new policy.

4. Movants hereby move to opt out of the class and object to this 23(b)(2) class action as presently framed without an opt out provision on the grounds that it is in violation of Movants' constitutional rights to due process, trial by jury, access to the Courts, and the proposed settlement is unfair, unreasonable, and inadequate to compensate Movants for their injuries suffered at the hands of the Defendant.

5. The certification of this action pursuant to ARCP 23(b)(2) without a right to opt out is a violation of the Movants' constitutional right to trial by a jury for their damage claims particularly where, as here, the appropriate relief for the Defendant's fraudulent and deceptive conduct of switching cancer policies concerns money and money damages, not equitable relief. The measure of recovery in the class certification order and under the proposed settlement is inconsistent with settled law. The class settlement wholly abandons substantial damage claims. Pursuant to the settlement, Movants will not

receive any monetary relief yet they are required to release their fraud claims against the Defendant.

6. Movants have suffered monetary damages consisting of, among other things, paying an excessive premium for an inferior policy, loss [sic] the time value of money paid in increased premiums, loss of the opportunity to obtain insurance with unlimited benefits for radiation, chemotherapy and other drug treatment on the basis of their classification and age at the time of the issue of the original policy, and mental anguish which will vary with each Movant.

7. Movants are constitutionally entitled to notice and an opportunity to opt out as a minimum requirement of due process in order to pursue their uniquely individual damage claims which will vary from Movant to Movant depending upon the time they were covered under a new policy, and the mental anguish of being defrauded and manipulated by the Defendant.

8. The class action as certified denies Movants their constitutional right to trial by jury on the claims for fraud and fraudulent concealment. Movants have a constitutional right to trial by jury which cannot and should not be eliminated by this Court's certification of the class without a right to opt out, or a settlement binding upon the Movants and to which the Movants object.

9. Movants also object to this Court's injunction of June 16, 1993, which upon information and belief was issued without a motion, without a hearing and without notice.

10. As an additional reason the proposed settlement affords inadequate relief (ie [sic], in addition to the fact that the Movants receive no money damages), the sole relief afforded to Movants would be to reinstate a reformed policy which would simply provide the Defendant more opportunity to defraud the Movants. The notice provides that premiums on the reformed policies will be frozen by the Court for less than one year, leaving the Defendant free to again charge class members with an excessive premium thereafter. The Defendants engaged in fraudulent switching of cancer policies solely for profit which has been realized, and the proposed settlement fails to require that the Defendant disgorge that illicit gain, and it also allows the Defendant to realize future profits at the expense of the class members. Moreover, the settlement requires Movants to release their claims for money damages without receiving any monetary benefit. Thus, under the proposed settlement the Defendant keeps its illicitly obtained profits, the Movants receive no money damages, and the only relief afforded the Movants is the receipt of a reformed policy with its concomitant requirement that the Movants continue to do business with the very Defendants who defrauded them.

11. The proposed settlement attempts to bar and dismiss claims against Torchmark even though Torchmark is not even a party to the class action.

WHEREFORE, Movants respectfully ask the Court to allow them to opt out of the class certification or in the

alternative Movants object to class certification and to the proposed settlement on the grounds set forth herein.

OLEN & McGLOTHREN, P.C.  
Attorneys for Movants  
Post Office Box 1826  
Mobile, Alabama 36633  
(205) 438-6957

/s/ Steve Olen  
STEVE OLEN

#### CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 18th day of January, 1994, served a copy of the foregoing by mailing the same by United States Mail, properly addressed and first class postage prepaid, to the following:

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James W. Gewin  
Bradley, Arant, Rose & White  
1400 Park Place Tower  
Birmingham, Alabama 35203

/s/ Steve Olen  
STEVE OLEN

---

4

NOV 12 1996

CLERK

In The  
Supreme Court of the United States

October Term, 1996

GUY E. ADAMS, et al.,

Petitioners,

v.

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The  
Supreme Court Of Alabama

JOINT APPENDIX  
VOLUME II, PAGES 246-536

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*Insurance Company*

Petition For Certiorari Filed May 16, 1996  
Certiorari Granted October 1, 1996

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IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on	)	
behalf of a class,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. CV-92-021
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant.	)	

PROOF OF DISTRIBUTION OF PRINTED NOTICE  
AND SUMMARY NOTICE

(Filed October 29, 1993)

Liberty National Life Insurance Company hereby shows unto the Court that it has complied with the notice obligations set forth in the Court's June 16, 1993 Order With Respect to Proposed Settlement, as amended by the Court's subsequent Order of August 2, 1993, and the Court's "Order Approving Printed Notice, Summary Notice, and Their Distribution and Publication" dated August 3, 1993. As shown by Exhibit 1 attached hereto, a printed notice has been duly distributed to class members in accordance with this Court's Orders, and the summary notice has been duly published in the newspapers required by the Court's Orders.

/s/ James W. Gewin  
James W. Gewin



/s/ Michael R. Pennington  
Michael R. Pennington

## OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE  
1400 Park Place Tower  
Birmingham, Alabama 35203  
(205) 521-8000

## OF COUNSEL:

Horace Williams, Esq.  
125 South Orange Avenue  
P. O. Box 896  
Eufaula, AL 36072-0896

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing Proof of Distribution of Printed Notice and Summary Notice on

Jere Beasley, Esq.  
Frank Wilson, Esq.  
Beasley, Wilson, Allen,  
Main Crowe  
10th Floor Bell Building  
807 Montgomery Street  
P. O. Box 4160  
Montgomery, Ala. 36103-4160

Walter Byars, Esq.  
Steiner, Crum & Baker  
8th Floor  
First Alabama Bank  
Building  
Montgomery, AL 36104

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The Hon. William H.  
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Stephen M. Gudac, Esq.  
600 BelAir Blvd.  
Suite 133  
Mobile, AL 36606

by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to their regular mailing address, on this 28th day of October, 1993.

/s/ Michael R. Pennington  
OF COUNSEL

EXHIBIT "1"

IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on	)	
behalf of a class,	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. CV-92-021
v.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant.	)	

AFFIDAVIT VERIFYING COMPLIANCE  
WITH NOTICE OBLIGATIONS

STATE OF ALABAMA )

COUNTY OF JEFFERSON )

Before me the undersigned Notary Public in and for said county and said state personally appeared Mr. Anthony L. McWhorter, who being known to me and

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

250 thru 253

August 29, 1986 and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and out-of-hospital prescription drugs, without monetary limits, and (3) were paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; *provided however*, that (i) any individual insured who is a named plaintiff in any other lawsuit against Liberty National which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer policies is excluded from the class *unless* such lawsuit has been voluntarily dismissed on or before the date this Settlement is finally approved by the Circuit Court of Barbour County, Alabama; and (ii) any individual insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the class; and (iii) any insured whose first Liberty National cancer policy was issued after August 29, 1986 is excluded from the class.

You are hereby notified, pursuant to Rule 23 of the Alabama Rules of Civil and [sic] Procedure and an order entered by this Court on June 16, 1993, that if you are a member of the class described above your rights will be affected by the above-styled class action and by a proposed settlement which will provide benefits to all members of the class described above, if approved by the



Court. The order entered by the Court on June 16, 1993 establishes a deadline of October 10, 1993 and other requirements for the filing of any objections to the proposed settlement. A hearing to determine whether the proposed settlement should be approved by the Court will be held on November 4, 1993 at 9:00 a.m. at the Barbour County Courthouse, Clayton, Alabama, at which time any person affected by the settlement may be heard thereon, provided the objector has complied with the Court's order. If you have not yet received the "Notice of Pendency of Action, Class Action Determination, Settlement and Settlement Hearing" which described this class action and the terms and conditions of the settlement, you may obtain a copy thereof by writing to: James A. Main, Beasley, Wilson, P.O. Box 4160, Montgomery, Alabama 36103-4160. If you have any questions concerning this matter, you may also contact class counsel James A. Main at the above address.

**PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE FOR INFORMATION.** The entire court file is available, however, for examination during regular office hours at the office of the clerk, Circuit Court of Barbour County, Alabama, Courthouse Square, Clayton, Alabama.

---

EXHIBIT G  
IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of a	)	
class,	)	
	)	CIVIL
Plaintiffs,	)	ACTION
	)	NO. CV-92-021
v.	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

MOTION FOR SUBSTITUTION OF NEW FAIRNESS  
HEARING DATE IN DOCUMENTS TO BE MAILED  
TO CLASS MEMBERS, FOR DESIGNATION OF  
ADDRESS FOR SPECIAL MASTER, FOR  
CORRECTION OF TYPOGRAPHICAL ERROR IN  
JUNE 16, 1993, ORDER WITH RESPECT TO  
PROPOSED SETTLEMENT, AND FOR CORRECTION  
OF INADVERTENT OMISSION IN STIPULATION  
PRIOR TO MAILING OF CLASS ACTION  
NOTICE AND ATTACHMENTS

(Filed August 2, 1993)

Defendant Liberty National Life Insurance Company, with the consent of Class Counsel, hereby moves the court for: (1) Permission to substitute the corrected date of November 4, 1993 as the date of the Fairness Hearing in all documents to be mailed to Class Members; (2) for an order designating a post office box for use of the Special Master to be appointed by the Court, so that the address thereof may be listed in the appropriate places in

the Notice and Proof of Claim Form to be mailed to members of the class; (3) the correction of a typographical error or omission in paragraph 3 of the Court's Order With Respect to Proposed Settlement of June 16, 1993; and (4) the approval of the correction of an inadvertent omission in the Stipulation as provided in Exhibit A, attached, prior to mailing of the Notice of Stipulation to class members. As grounds therefor, Liberty National would show unto the Court as follows:

1. The Notice and Proof of Claim Form to be mailed to class members contains instructions to return the Proof of Claim form to the Special Master. However, as yet, no address has been designated by the Court for return of the Proof of Claim Forms. Before the Notice and Proof of Claim Form can be mailed to class members, an address must be inserted. The Notice, Proof of Claim Form and other attachments are due to be mailed on approximately August 16, 1993.

2. In the Court's Order With Respect to the Proposed Settlement, and particularly in paragraph 3 thereof, there is the following clause:

3. The Court finds for purposes of settlement that the Named Plaintiff's counsel are adequate representatives of and the Class Counsel for respectively, . . .

June 16, 1993 Order With Respect to Proposed Settlement, ¶ 3. There appears to have been an omission from this clause which makes the clause unintelligible. Counsel for the class and for Liberty National believe that the sentence was supposed to read as follows:

3. The Court finds for purposes of settlement that the Named Plaintiff and Class Counsel are adequate representatives of and counsel for the Class, respectively, . . .

Liberty National therefore requests the Court to order that paragraph 3 of the June 16, 1993 "Order With Respect to Proposed Settlement" is amended as herein reflected.

3. Liberty National further seeks permission from the Court to substitute the date of November 4, 1993 (in place of October 20, 1993) as the date of the fairness hearing for purposes of the printed notice, proof of claim form, and other documents to be mailed to Class Members, in accordance with the Court's oral announcement on July 27, 1993.

4. The Stipulation and Agreement of Compromise and Settlement executed by Liberty National and Class Counsel on June 16, 1993 contains an inadvertent omission which was discovered during the process of proof-reading the notice for purposes of printing and mailing. Under the Paragraph II-6 of the Stipulation, the Stipulation makes it clear that reformation of new policies currently in force will be available not only to class members who contemporaneously exchanged an old policy for a new policy, but also to "class members who lapsed the old policy, but bought a new policy within 30 days of that lapse, and those class members who originally contemporaneously switched from an old policy to a new policy, but subsequently switched from one policy to another new policy". Obviously, the same language should have been carried over to Paragraphs II-9, II-10, and II-12 of the Agreement, which deal with restitution and eligibility to share in the two supplementary pools. However, this

language was inadvertently omitted from paragraphs II-9, II-10, and II-12 of the Stipulation. As shown by Exhibit A hereto and pursuant to this Court's June 16, 1993 Order, Named Plaintiff, Class Counsel and Liberty National are in agreement that the Stipulation should be corrected in this regard before the printed notice and Stipulation and mailed to class members.

WHEREFORE, Liberty National respectfully requests the Court to enter an Order designating a post office box or address for return by class members of the Proof of Claim forms to the Special Master; to enter an order correcting paragraph 3 of the June 16, 1993 "Order With Respect to Proposed Settlement" as reflected herein or in such manner as the Court may deem appropriate; to enter an order approving the substitution of the date of November 4, 1993 as the date of the fairness hearing in all documents to be mailed to Class Members; and to enter an Order approving the correction of the inadvertent omission described above in the Stipulation and Agreement of Compromise and Settlement before said Stipulation is mailed to class members. For the convenience of the Court, a proposed order is attached.

/s/ James W. Gewin  
James W. Gewin

/s/ Michael R. Pennington  
Michael R. Pennington

Counsel for Liberty National Life  
Insurance Company

# OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE  
1400 Park Place Tower  
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(205) 521-8000

/s/ Horace Williams  
Horace Williams  
Counsel for Liberty  
National Life Insurance  
Company

P.O. Box 896  
Eufaula, Alabama 36072-0896

## CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing Motion For Designation Of Address Of Special Master, for Correction of Typographical Error in Proposed Order of June 16, 1993, and for Correction of Inadvertent Omission in Stipulation Prior to Mailing of Class Action Notice And Attachments on

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Montgomery, Alabama 36103-4160

Walter Byars, Esq.  
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8th Floor  
First Alabama Bank Building  
Montgomery, AL 36104

Larry U. Sims, Esq.  
Helmsing, Lyons, Sims & Leach  
P.O. Box 2767  
Mobile, Alabama 36652-2767

by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to their regular mailing address, on this 30 day of July, 1993.

/s/ Horace Williams  
Of Counsel

EXHIBIT A  
IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of a	)	
class,	)	
Plaintiffs,	)	CIVIL
	)	ACTION
v.	)	NO. CV-92-021
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant.	)	

AMENDMENT TO JUNE 16, 1993 STIPULATION AND  
AGREEMENT OF COMPROMISE AND SETTLEMENT

Named plaintiff Charlie Frank Robertson, Class Counsel Jere Beasley, James Main, Frank Wilson, and Walter Byars, and defendant Liberty National hereby agree, subject to court approval, that the Stipulation and Agreement of Compromise and Settlement ("Stipulation") heretofore executed by them on June 16, 1993, is hereby amended to correct an inadvertent omission, by adding the following sentence to the end of each of paragraphs II-9, II-10 and II-12 of the Stipulation.

Class members eligible hereunder for the benefits of this paragraph shall include and be limited to those class members described in this paragraph who contemporaneously switched from an old policy to a new policy (including class members who lapsed the old policy, but bought a new policy within 30 days of that

lapse), and any such class members who originally contemporaneously switched from an old policy to a new policy but subsequently switched from one new policy to another new policy.

DATED: July 29, 1993.

/s/ Charlie Frank Robertson  
Charlie Frank Robertson,  
Named Plaintiff, individually  
and on behalf of the Class

/s/ Jere Beasley by James  
Jere Beasley

/s/ Frank Wilson by James  
Frank Wilson

/s/ James Allen Main  
James Main

Class Counsel

OF COUNSEL:

Beasley, Wilson, Allen, Main & Crow  
10th Floor Bell Building  
807 Montgomery Street  
P.O. Box 4160  
Montgomery, Alabama 36103-4160

/s/ Walter R. Byars  
Walter Byars, Class Counsel

OF COUNSEL:

Steiner, Crum & Baker  
8th Floor  
First Alabama Bank Building  
Montgomery, AL 36104

LIBERTY NATIONAL LIFE  
INSURANCE COMPANY

By: /s/ William C. Barclift  
William C. Barclift

Its: General Counsel

/s/ James W. Gewin  
James W. Gewin  
One of the Attorneys for  
Liberty National Life  
Insurance Company

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE  
1400 Park Place Tower  
Birmingham, Alabama 35203  
(205) 521-8000

---

IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of a	)	
class,	)	
	)	CIVIL
Plaintiffs,	)	ACTION
	)	NO. CV-92-021
v.	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

ORDER

(Filed August 2, 1993)

This matter having come on to be heard upon the motion heretofore filed by Liberty National Life Insurance Company, with the consent of Class Counsel, entitled "Motion for Substitution of New Fairness Hearing Date in Documents to be Mailed to Class Members, for Designation of a Address of Special Master, For Correction of Typographical Error in June 16, 1993 Order With Respect to Proposed Settlement, and for Correction of Inadvertent Omission in Stipulation Prior to Mailing of Class Action Notice and Attachments," and the Court having considered said motion.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. The special master's address to be included in the class action notice and certain of its attachments shall be as follows:

P.O. Box 1449  
Eufaula, Al 36072-1449

2. The first clause of paragraph 3 of the Court's Order With Respect to Proposed Settlement of June 16, 1993 is hereby amended to read as follows:

3. The Court finds for purposes of settlement that the Named Plaintiff and Class Counsel are adequate representatives of and counsel for the class, respectively, . . .

Said Order is further amended to substitute the date of November 4, 1993 as the date of the Fairness Hearing previously scheduled for October 20, 1993. Except as amended herein, the June 19, 1993 Order With Respect to Proposed Settlement and the deadlines contained therein shall remain unchanged. Liberty National is authorized to substitute the corrections provided herein when it reproduces the June 16, 1993 Order With Respect to Proposed Settlement and other documents in connection with the printing and mailing of the Class Action Notice.

3. The "Amendment to June 16, 1993 Stipulation and Agreement of Compromise and Settlement" which is attached as Exhibit A to the above-referenced motion is hereby APPROVED, and Liberty National is authorized to insert the additional sentence set forth in said amendment at the end of paragraphs II-9, II-10, and II-12 of the Stipulation for purposes of printing and mailing the Class Action Notice and its attachments.

DATED this 2nd day of Aug, 1993.

/s/ W. H. Robertson  
Circuit Judge



IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of a	)	
class,	)	
	)	CIVIL
Plaintiffs,	)	ACTION
	)	NO. CV-92-021
v.	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

NOTICE OF INTENT TO MAIL CLASS ACTION  
NOTICE AND TO PUBLISH SUMMARY NOTICE,  
AND MOTION FOR APPROVAL OF PRINTED  
NOTICE, SUMMARY NOTICE AND THEIR  
DISTRIBUTION AND PUBLICATION

(Filed August 3, 1993)

Defendant Liberty National Life Insurance Company herein gives notice of the steps it has taken and is taking to comply with the orders heretofore entered by the Court regarding the mailing and publication of the class action notices, and, out of an abundance of caution, and in light of the change in the fairness hearing date ordered by the Court, and other corrections approved by the Court in the documents to be mailed to class members, Liberty National hereby requests pre-distribution court approval of the final printed notice, the summary notice, and the distribution and publication thereof, all as follows:

1. Not later than August 29, 1993, Liberty National intends to cause to be published in the newspapers described in paragraph 7(c) of the Court's June 16, 1993 Order a summary notice in the form attached hereto as Exhibit 1. Said notice will be published in each of the newspapers identified by name in paragraph 7(c) of the Order, and in one newspaper (within the top three in circulation) in each other state in which Liberty National cancer policies have ever been approved for issuance. Liberty National wishes to inform the Court that in some instances, Liberty National cancer policies were approved many years ago for issuance in certain states, but were never actually issued in such states. Nevertheless, in accordance with this Court's Order of June 16, 1993, Liberty National intends to publish notice in newspapers in every state where Liberty National cancer policies were approved for issuance, even where no policies were ever actually issued.

2. Attached hereto as Exhibit 2 is a sample proof of the printed Notice which Liberty National intends to mail as required by this Court's Order of June 16, 1993. The proof includes all corrections heretofore approved by the Court. The notice to be mailed shall be in the form of Exhibit 2, except that the Notice will be bound in booklet form, with printing on both sides of the page, and with perforations for easier removal and submission of the Proof of Claim Form. Liberty National intends to mail a copy of this booklet to each of the persons described below on approximately August 16, 1993, by United States mail, first-class postage prepaid. Liberty National, out of an abundance of caution, seeks confirmation by the Court that this printed notice complies with the Court's

June 16, 1993 Order prior to its distribution, so that any remaining errors or omissions can be corrected before the notice is mailed.

3. Liberty National has assembled or is assembling the names and last known addresses of the approximately 400,000 class members whose identities and last known addresses are reasonably ascertainable from Liberty National's records and who are entitled to receive notice under this Court's Order of June 16, 1993, to the best of Liberty National's knowledge. Liberty National has identified and is identifying such persons as follows:

a. Liberty National has determined or is determining from its records the names and last known addresses of each named insured on each "old policy" (as that term is defined in the Stipulation) which was in force or in the grace period on or after August 29, 1986, according to Liberty National's records. Only persons insured under "old policies" which were in force or in the grace period on or after August 29, 1986 are members of the Class. Notices sent to this group will be addressed to each such named insured "and family."

b. Liberty National intends to mail the notice to any and all insureds who have submitted any claims for benefits for cancer treatment rendered to any covered person under any "new policy" (as that term is defined in the Stipulation) since August 29, 1986; provided, however, that notice will not be mailed to those cancer claimants who can be identified from Liberty National records as persons who are not class members. Liberty National also intends to mail notice to all class members who have filed

actions against Liberty National concerning the "alleged cancer exchange programs" as defined in the Stipulation. Insureds who filed such separate actions prior to March 10, 1993, and who would become members of the class if their pending actions are voluntarily dismissed without prejudice prior to any final approval of the Settlement, will be mailed a copy of the notice as well.

c. Collectively, the named insureds (and their insured family members) under "old policies" which were in force or in the grace period on or after August 29, 1986 constitute all members of the class. Current policyholders are not class members unless they were previously insured under "old policies" which were in force or in the grace period on or after August 29, 1986, and the Order entered by the Court on June 16, 1993 contemplates that Liberty National need not send notice to persons who are not class members. As noted above, all notices sent to named insureds under old policies which were in force or in the grace period on or after August 29, 1986 will be addressed to the pertinent named insured "and family", which collectively constitute all members of the class.

4. In addition to the foregoing, for any class action notices which are returned by the postal service undelivered, Liberty National intends to use its best efforts to identify (from National Change of Address registries, or otherwise) the present address of the intended recipient, and to mail or personally deliver notice to each such individual no later than 30 days in advance of the fairness hearing, in compliance with the Court's June 16, 1993 Order.



5. Between now and August 16, 1993, Liberty National intends to take the steps necessary to accomplish the actual printing and physical mailing of the approximately 400,000 notices to be mailed as described herein. **Liberty National has been advised by its printing contractor that the printing contractor must begin printing the notice no later than Thursday, August 5, 1993 in order to physically accomplish the printing and mailing by August 16, 1993.**

6. After the actual mailing and distribution of the printed notice and publication of the summary notice as described herein, Liberty National will file with the Court an affidavit verifying its implementation of and compliance with the distribution and publication procedures described above, and verifying that the actual mailing, publication, and follow-up notice efforts have taken place.

WHEREFORE, Liberty National Life Insurance Company respectfully requests the Court to approve and authorize Liberty National to proceed with the printed notice, the summary notice, distribution of the notice and publication of the summary notice, all as described herein, and to approve said notice, summary notice, distribution and publication as constituting compliance with the Court's June 16, 1993 Order, if said distribution and publication is implemented as described herein. For the convenience of the Court, a proposed Order is attached.

/s/ James Gewin/MRP  
James W. Gewin

/s/ M.R. Pennington  
Michael R. Pennington

Counsel for Liberty National  
Life Insurance Company/

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE  
1400 Park Place Tower  
Birmingham, Alabama 35203  
(205) 521-8000

/s/ Horace Williams  
Horace Williams  
Counsel for Liberty  
National Life Insurance  
Company

OF COUNSEL:

P.O. Box 896  
Eufaula, Alabama 36072-0896

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing Notice of Intent To Mail Class Action Request Notice And Request For Approval on

William Roedder, Esq.  
Hand Arendall, Bedsole, Greaves and Johnston  
P.O. Box 123  
Mobile, Alabama 36601,



Mary Katherine Miller, Esq.  
 Armbrecht, Jackson, DeMouy, Crowe,  
 Holmes & Reeves  
 P.O. Box 290  
 Mobile, AL 36601

John Richardson, Esq.  
 Richardson, Daniel, Spear and Upton  
 P.O. Box 16428  
 Mobile, Alabama 36609

Joe Sullivan, Esq.  
 Hamilton, Butler, Riddick, Tarlton & Sullivan  
 P.O. Box 1743  
 Mobile, AL 36633-1743

Frank Wilson, Esq.  
 Beasley, Wilson, Allen, Main & Crow  
 10th Floor Bell Building  
 807 Montgomery Street  
 P.O. Box 4160  
 Montgomery, Alabama 36103-4160

Walter Byars, Esq.  
 Steiner, Crum & Baker  
 8th Floor  
 First Alabama Bank Building  
 Montgomery, AL 36104

Larry U. Sims, Esq.  
 Helmsing, Lyons, Sims & Leach  
 P.O. Box 2767  
 Mobile, Alabama 36652-2767

by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to their regular mailing address, on this 3 day of July, 1993.

/s/ Horace Williams  
 Of Counsel

## EX. A

IN THE CIRCUIT COURT OF  
 BARBOUR COUNTY, ALABAMA  
 CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of	)	
a class,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. CV-92-021
v.	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

SUMMARY NOTICE OF THE PENDENCY OF CLASS  
ACTION AND PROPOSED SETTLEMENT THEREOF

TO: ALL MEMBERS OF THE FOLLOWING CLASS:

All persons who now or in the past were insured under any cancer policies which (1) were issued by Liberty National Life Insurance Company ("Liberty National") on or before August 29, 1986 and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and out-of-hospital prescription drugs, without monetary limits, and (3) were paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; *provided, however*, that (i) any individual insured who is a named plaintiff in any other lawsuit against Liberty National which was filed on or before March 10, 1993 and

which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer policies is excluded from the class *unless* such lawsuit has been voluntarily dismissed on or before the date this Settlement is finally approved by the Circuit Court of Barbour County, Alabama; and (ii) any individual insured whose "old policy" lapsed prior to August 20, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the class; and (iii) any insured whose first Liberty National cancer policy was issued after August 29, 1986 is excluded from the class.

You are hereby notified, pursuant to Rule 23 of the Alabama Rules of Civil and [sic] Procedure and an order entered by this Court on June 16, 1993, that if you are a member of the class described above your rights will be affected by the above-styled class action and by a proposed settlement which will provide benefits to all members of the class described above, if approved by the Court. The order entered by the Court on June 16, 1993 establishes a deadline of October 10, 1993 and other requirements for the filing of any objections to the proposed settlement. A hearing to determine whether the proposed settlement should be approved by the Court will be held on November 4, 1993 at 9:00 a.m. at the Barbour County Courthouse, Clayton, Alabama, at which time any person affected by the settlement may be heard thereon, provided the objector has complied with the Court's order. If you have not yet received the "Notice of

Pendency of Action, Class Action Determination, Settlement and Settlement Hearing" which describes this class action and the terms and conditions of the settlement, you may obtain a copy thereof by writing to: James A. Main, Beasley, Wilson, P.O. Box 4160, Montgomery, Alabama 36103-4160. If you have any questions concerning this matter, you may also contact class counsel James A. Main at the above address.

**PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE FOR INFORMATION.** The entire court file is available, however, for examination during regular office hours at the office of the clerk, Circuit Court of Barbour County, Alabama, Courthouse Square, Clayton, Alabama.

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IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of	)	
a class,	)	
	)	CIVIL ACTION
Plaintiffs,	)	NO. CV-92-021
	)	
v.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

ORDER APPROVING PRINTED NOTICE,  
SUMMARY NOTICE, AND  
THEIR DISTRIBUTION AND PUBLICATION

This matter having come before the Court on a Motion of Liberty National Life Insurance Company for approval of the printed notice, summary notice and the distribution and publication thereof, and the Court having considered the same, and having concluded that the motion should be granted,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The summary notice attached as Exhibit 1 to the above-described motion is approved as being in compliance with the Court's Order With Respect To Proposed Settlement of June 16, 1993.

2. The printed notice attached as Exhibit 2 to the above-described motion is approved as being in compliance with the Court's Order With Respect To Proposed Settlement dated June 16, 1993.

3. Liberty National is authorized to proceed with the mailing of the printed notice and publication of the summary notice as described in the motion, all of which the Court hereby approves as contemplated by the Court's Order With Respect to Proposed Settlement dated June 16, 1993.

DONE AND ORDERED this the \_\_\_\_ day of \_\_\_\_\_, 1993.

/s/ \_\_\_\_\_  
Circuit Judge



IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of	)	
a class,	)	
	)	CIVIL ACTION
Plaintiffs,	)	NO. CV-92-021
	)	
v.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

ORDER APPROVING PRINTED NOTICE,  
SUMMARY NOTICE, AND THEIR  
DISTRIBUTION AND PUBLICATION

(Filed August 3, 1993)

This matter having come before the Court on a Motion of Liberty National Life Insurance Company for approval of the printed notice, summary notice and the distribution and publication thereof, and the Court having considered the same, and having concluded that the motion should be granted,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The summary notice attached as Exhibit 1 to the above-described motion is approved as being in compliance with the Court's Order With Respect To Proposed Settlement of June 16, 1993.

2. The printed notice attached as Exhibit 2 to the above-described motion is approved as being in compliance with the Court's Order With Respect To Proposed Settlement dated June 16, 1993.

3. Liberty National is authorized to proceed with the mailing of the printed notice and publication of the summary notice as described in the motion, all of which the Court hereby approves as contemplated by the Court's Order With Respect to Proposed Settlement dated June 16, 1993.

DONE AND ORDERED this the 3rd day of August, 1993.

/s/ W. H. Robertson  
Circuit Judge

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EXHIBIT H  
IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of	)	
a class,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. CV-92-021
v.	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	
_____	)	

**NOTICE OF PENDENCY OF ACTION,  
CLASS ACTION DETERMINATION,  
SETTLEMENT AND SETTLEMENT HEARING**

**TO: MEMBERS OF THE FOLLOWING CLASS:**

All persons who now or in the past were insured under any cancer policy which (1) was issued by Liberty National Life Insurance Company ("Liberty National") on or before August 29, 1986 and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; *provided, however*, that (i) any individual insured who is or

was a named plaintiff in any separate lawsuit was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the class *unless* such lawsuit has been voluntarily dismissed without prejudice on or before the date this Settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the class.

**PLEASE READ THIS NOTICE CAREFULLY IN ITS ENTIRETY. IF YOU ARE A MEMBER OF THE CLASS DESCRIBED ABOVE, YOUR RIGHTS WILL BE AFFECTED BY LEGAL PROCEEDINGS IN THIS CLASS ACTION. THE NAMED PLAINTIFF, CLASS COUNSEL, AND DEFENDANT HAVE AGREED TO A CLASS ACTION SETTLEMENT OF THE LITIGATION WHICH PROVIDES FOR BENEFITS TO MEMBERS OF THE CLASS IF THE SETTLEMENT IS APPROVED BY THE COURT. IF THE SETTLEMENT IS APPROVED, IT WILL BE BINDING UPON ALL MEMBERS OF THE CLASS. [NOTE: THE TERMS "OLD POLICY" AND "NEW POLICY" ARE DEFINED ON PAGE 3 BELOW, UNDER THE HEADING "DEFINITIONS"].**

## I. THE SETTLEMENT HEARING

This notice is given pursuant to Rule 23 of the Alabama Rules of Civil Procedure and pursuant to an order of the Circuit Court of Barbour County, Alabama ("the Court") entered in the above-entitled action (the "litigation"), which is more particularly described below under the caption "background." If you are a member of the Class (defined above), you have an interest in the litigation. You are hereby notified that a hearing will be held before the Court at the Barbour County Courthouse, Court Square, Clayton, Alabama, on November 4, 1993 at 9:00 a.m., and that said hearing shall begin on that date and may be adjourned and continue from time to time without further notice except as announced at said hearing. The purpose of said hearing (the "fairness hearing" or "settlement hearing")— is to determine whether (i) the Stipulation and Agreement of Compromise and Settlement dated June 16, 1993 (the "Stipulation"), a copy of which is attached hereto as Exhibit 1 (See p. 19, below), and the terms and conditions of the Settlement proposed in the Stipulation ("The Settlement"), are fair, reasonable and adequate and should be approved, and (ii) whether an order and final judgment should be entered granting injunctive, declaratory and equitable relief (including reformation of policies, ancillary restitution and other ancillary monetary relief) necessary to implement the Settlement, and dismissing the litigation and all claims of any Class Member which were or could be asserted therein in their entirety with prejudice, and approving the release of all claims of any class member within the scope of the Settlement; (iii) whether the Court should

enter an Order, pursuant to the Stipulation and Settlement, permanently barring and enjoining the institution or prosecution of other actions or proceedings asserting any claims which are Released Claims as defined in Section III of the Stipulation; (iv) whether this action is properly maintained as a class action pursuant to Rule 23(b)(2) of the Alabama Rules of Civil Procedure; (v) whether Named Plaintiff is a proper and adequate representative of the Class; and (vi) all other matters relating to the question of whether the Settlement should be approved and enforced according to its terms. The Court has reserved the right to adjourn the settlement hearing from time to time by oral announcement at such hearing or any adjournment thereof, without further notice of any kind. The Court has also reserved the right to approve the Stipulation before it and the Settlement, with or without modifications; to enter its Final Judgment dismissing the litigation with prejudice in its entirety; to order the payment of attorneys' fees and expenses; and to tax and order the payment of costs, including fees and expenses of experts and consultants; all without further notice of any kind.

## II. CLASS ACTION DETERMINATION

The Court has ordered that the litigation shall be maintained as a class action brought by the Named Plaintiff Charlie Frank Robertson as class representative, pursuant to Rule 23(b)(2) of the Alabama Rules of Civil Procedure, on behalf of a class consisting of:

**All persons who now or in the past were insured under any cancer policy which (1) was**



issued by Liberty National Insurance Company ("Liberty National") on or before August 29, 1986 and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; *provided, however*, that (i) any individual insured who is or was a named plaintiff in any separate lawsuit which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the class *unless* such lawsuit has been voluntarily dismissed without prejudice on or before the date this Settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the class.

The Court has preliminarily determined that the nature of the interests of the Class Members, the nature of the proposed Settlement, the primacy of the injunctive and equitable relief called for by the Settlement and

which would appear to be justified if the conduct alleged by Named Plaintiff (but denied by Liberty National) is assumed to be true, and the fact that the vast majority of Class Members have suffered no actual out-of-pocket losses or monetary damages as a result of the conduct alleged in this action, even assuming those allegations to be true, make this action inappropriate for certification under Alabama Rule of Civil Procedure 23(b)(3).

The Court has preliminarily found, for purposes of the settlement proceedings, that the Named Plaintiff's claims are typical of the Class, that there are questions of law and fact common to the Class, that the Class is so numerous that joinder of all Members of the Class is impracticable, and that the Named Plaintiff and Class Counsel have and will continue to fairly and adequately represent and protect the interests of the Class. The Court has further found, for purposes of the settlement proceedings, that the alleged (but denied) actions of defendant would appear to make it appropriate for the Court to enter final injunctive and equitable relief with respect to the Class as a whole, and to order certain restitution and other monetary relief incidental to the primary injunctive and equitable relief.

The Court has designated the Named Plaintiff to act as representative for the Class and has designated Named Plaintiff's counsel - James A. Main, Jere Beasley, and Frank Wilson of Beasley, Wilson, Allen, Main and Crow, P.C., and Walter Byars of Steiner, Crum and Baker - as Class Counsel. Communications with the class representative and Class Counsel may be directed to the attention of James A. Main, Beasley, Wilson, Allen, Main & Crow, P.O. Box 4160, Montgomery, Alabama 36103-4160.

### III. BACKGROUND FACTS AND TERMS OF SETTLEMENT

#### DEFINITIONS

The following words or phrases, whenever they appear in this Notice, shall have the following meaning ascribed to them, and the singular includes the plural, and the plural the singular:

1. **"Old Policy" and "Old Cancer Policy"** shall mean any cancer insurance policy or policies issued by Liberty National Life Insurance Company ("Liberty National") which (i) contained no monetary limits or exclusions regarding benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, and (ii) which was issued prior to August 29, 1986.

2. **"New Policy" and "New Cancer Policy"** shall mean any cancer insurance policy or policies issued by Liberty National on or after August 29, 1986 which contained monetary limits upon or exclusions of benefits for otherwise covered radiation, chemotherapy, and prescription chemotherapy drugs and provided no benefits or coverage for other out-of-hospital prescription drugs (but also contained certain other new or enhanced benefits).

3. **"Class"** shall mean the Class certified by the Barbour County Circuit Court as described on page 1 of this Notice.

4. **"Named Insured" or "Policyholder"** shall mean the person listed as "insured" on the face of the policy, and to whom benefits under the policy for the treatment

of persons covered under the policy are payable by the terms of the policy.

5. **"Covered persons"** shall mean dependents of the named insured who are covered persons within the meaning of the applicable policy.

6. **"Other out-of-hospital prescription drugs" or "other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer"** shall mean all prescription drugs, other than prescription chemotherapy drugs, prescribed for any covered person with a diagnosis of cancer for use outside of a hospital in the (i) treatment of cancer, or (ii) treatment of the effects of cancer or of cancer treatment.

There has been no trial of this action, and the Court has made no findings of fact or liability on the merits of the causes of action alleged by the Named Plaintiff or the defenses available to Liberty National. The Stipulation attached hereto contains a brief recitation of the facts and claims involved in this Litigation, as well as a complete statement of the terms of the proposed Settlement. The Settlement will provide substantial benefits to the class as a whole if the Settlement is finally approved by the Court.

The principal background facts, terms, conditions and other matters pertaining to the Stipulation and the Settlement which it contemplates are summarized below. The entire Stipulation (Exhibit I attached hereto) should be reviewed for a more complete and detailed statement of the terms of the Settlement. The Stipulation shall govern the implementation and enforcement of the Settlement in the event the Settlement is finally approved.



Liberty National is an insurance company which offers, in addition to other insurance products, policies of insurance providing benefits to policyholders and insureds who are diagnosed with cancer.

Liberty National had in force, prior to August 29, 1986, old cancer policies which, among other benefits, provided benefits payable without monetary limits to the named insureds under such policies for themselves and other insured family members ("covered person") for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs.

It is alleged in this action that, beginning on or about August 29, 1986, and on other occasions thereafter, Liberty National instituted a program or programs to offer those customers having the old cancer policies the opportunity to replace their old cancer policies then in effect with one of several new cancer policies which contained substantial new benefits not provided by the old policies, but also contained monetary limits for otherwise covered radiation, chemotherapy and prescription chemotherapy drugs, and provided no benefit for other out-of-hospital prescription drugs (the "alleged cancer policy exchange programs").

The new policies provided certain new or enhanced benefits not provided by the old policy including, but not limited to, the following new benefits under certain of the "new policy" forms: a "first occurrence" benefit payable to the named insured for each insured upon initial diagnosis of cancer; dread disease benefits; hospice benefits; benefits for prostheses; experimental treatment benefits; disability income benefits; and other new benefits.

As of August 29, 1986, Liberty National discontinued the sale of old policies, although old policies issued prior to that date remained in force for those who already had such policies, chose not to replace the old policy with the new policy, and continued to pay premiums on the old policy as and when due.

Under all old policies and new policies, all benefits payable for the treatment rendered to any insured are payable to the named insured under the policy.

Charlie Frank Robertson ("Robertson"), prior to August 29, 1986, had purchased from Liberty National one of the old cancer policies defined in definition 1 above. After August 29, 1986, Robertson terminated his old policy and purchased one of the new policies to replace his old policy. Robertson was also the named insured under the new policy. Robertson has not been diagnosed with cancer and has made no claim for benefits under the new policy.

Robertson, on behalf of himself and the Class, contends that in the course of implementing the alleged cancer policy exchange programs, Liberty National misrepresented or failed to disclose material facts as to the limits imposed by the new policies on benefits for radiation, chemotherapy and prescription chemotherapy drugs and the elimination of coverage for other out-of-hospital prescription drugs, and failed to adequately inform policyholders that such coverages were provided without such monetary limits or exclusion under the old policies.

Liberty National vigorously denies Robertson's allegations, and Liberty National contends that the new policies provided substantially greater overall monetary



benefits or coverage to most, if not all, policyholders or insureds, and have paid greater overall benefits to a large majority of named insureds who submitted cancer claims.

The proposed Settlement confers substantial benefits upon the Class Members. The Settlement, *if approved*, will include the following benefits to Class Members, subject to the terms and conditions of the Stipulation:

(1) Class Members who are named insureds under new policies currently in force and who qualify under paragraph II-6 of the Stipulation will receive an automatic increase in their coverage (without any additional premium) such that, so long as the current new policy is kept in force and all premiums are paid, the policy will provide prospective benefits without any "caps" or monetary limits for otherwise covered radiation treatment, chemotherapy treatment, prescription chemotherapy drugs, or other out-of-hospital prescription drugs administered to any covered person under the policy in connection with the treatment of cancer. Persons who are not Class Members are not entitled to this benefit. Only Class Members who qualify under paragraph II-6 of the Stipulation are entitled to this benefit. If you are a Class Member and you currently have a new policy in force and you otherwise qualify under paragraph II-6 of the Stipulation, you do not have to submit any Proof of Claim Form to receive this expanded coverage benefit.

(2) All premiums for new policies of Class Members which are currently in force and old policies of Class Members which are currently in force will be frozen until January 1, 1995. If you are a Class Member, and you have a Liberty

National cancer policy currently in force, you do not have to submit any Proof of Claim Form to receive this premium freeze benefit. Persons who are not Class Members will not receive this premium freeze benefit. Class members who do not have a Liberty National old policy or new policy currently in force will not receive this benefit.

(3) The claims and premium experience of Class Members currently insured under old or new policies will be pooled for purposes of any rate filings or premium increases after January 1, 1995, except as otherwise ordered by the insurance departments of the states in which the policies are issued. Persons who are not Class Members are not required to be "pooled" with Class Members for the purposes of future rate filings or premium increases. Class Members with Liberty National cancer policies currently in force will receive this pooling benefit automatically if the Settlement is approved, and are not required to submit a Proof of Claim Form in order to receive this benefit. Class members who do not have a Liberty National cancer policy currently in force will not receive this pooling benefit.

(4) All Class Members who qualify under paragraphs II-10 and II-11 of the Stipulation and who were named insureds under new policies under which any benefit claim has previously been submitted for cancer treatment administered to a covered person, will, if such treatment included radiation, chemotherapy, prescription chemotherapy drugs, or out-of-hospital prescription drugs prescribed in connection with cancer, receive full restitution of any amount by

which the total of all benefits *which would have been received* by the Class Member as a result of the cancer treatment *under the old policy* (had the old policy stayed in force) would have exceeded the amount *actually paid* to (or to the assignee of) the named insured Class Member under the new policy. Class Members must submit a true and proper Proof of Claim Form (and must be eligible under paragraph II-10 of the Stipulation) to be considered eligible for this benefit. If you have submitted a benefit claim to Liberty National for cancer treatment regarding any covered person under your new policy since August 29, 1986, you should read the Proof of Claim Form enclosed [see p. 9, below], and follow the instructions on the Proof of Claim Form carefully. Proof of Claim Forms must be submitted no later than December 20, 1993. You do not waive your right to object to or appeal this Settlement by filing a Proof of Claim Form

(5) Class members who qualify under paragraph II-12 of the Stipulation and who were named insureds under a new policy and who have, since August 29, 1986, heretofore submitted benefit claims for radiation, chemotherapy, prescription chemotherapy drugs, or incurred expenses for out-of-hospital prescription drugs prescribed in connection with the treatment of cancer for any covered person under their new policy, and who otherwise qualify under the terms of the Stipulation and the instructions contained in the Proof of Claim Form, shall share in an Incidental Monetary Relief Fund of \$1,000,000.00 and/or an Extracontractual Monetary Relief Fund of \$3,000,000.00. You should consult paragraphs II-9, II-10, II-11, and II-12 of the enclosed Stipulation for eligibility to share

in these funds. You will not share in these funds unless you submit the enclosed Proof of Claim Form on or before December 20, 1993 and are eligible under the Stipulation to do so. Persons who are not Class Members will not share in these funds.

(6) If you are a Class Member who qualifies under paragraph II-6 of the Stipulation and you are a named insured under a Liberty National cancer policy currently in force, Liberty National will be prohibited by the Court from denying – on the basis of any monetary limits upon or exclusions of such benefits currently appearing in your new policy – any otherwise valid future benefit claims by you for radiation, chemotherapy, prescription chemotherapy drugs, and out-of-hospital prescription drugs administered to any covered person in connection with the treatment of cancer, so long as your current policy is kept in force and all premiums are paid. Named Insured Class Members who qualify under paragraph II-6 of the Stipulation will receive this benefit of this paragraph automatically if the Settlement is approved, and do not need to submit a Proof of Claim Form to receive this benefit.

(7) *Class Members Insured Under Old Policies Which Lapsed After August 29, 1986 May Reinstate Policies.* Pursuant to the injunction to be entered by the Circuit Court against Liberty National, and subject to the terms and conditions of paragraph II-5 of the Stipulation, Class Members who were named insureds under an old cancer policy which was (i) in effect (or in the grace period) as of August 29, 1986, and (ii) which was originally issued by Liberty National, and



(iii) which provided for benefits without monetary limits for radiation, chemotherapy, prescription chemotherapy drugs and/or other out-of-hospital prescription drugs, and (iv) which lapsed *after* August 29, 1986 (but was not replaced by a new policy within 30 days), shall have the option to reinstate his/her old policy, on a prospective basis only, without regard to insurability, at the current 1993 initial premium rate, based on such Class Member's age on the date the old policy was originally issued. Current 1993 premium rates will not be increased prior to January 1, 1995. Premiums for the reinstated policy will be charged on a prospective basis only, and coverage under the reinstated policy will be on a prospective basis only. This option may be exercised by delivering a written request for reinstatement to: Thomas E. Hamby, Vice President, Liberty National Life Insurance Company, P.O. Box 2612, Birmingham, Alabama 35202. This option will expire if not exercised on or before January 1, 1995. If the option is exercised, reinstatement shall be effective only upon final approval of the Settlement (and final binding affirmance in the event of appeal) and upon receipt of the applicable premium. Liberty National shall be enjoined to reinstate the policy of any Class Member who requests and qualifies for reinstatement under the Stipulation, subject to the terms and conditions of the Stipulation. Any such reinstatement shall result in the cancellation of any new policy of such Class Member purchased while the Class Member was in lapsed status as to the old policy, and its replacement by the reinstated old policy on the

terms provided in paragraph II-5 of the Stipulation. Upon the lapse for non-payment of premiums or cancellation by the Named Insured of any policy reinstated under paragraph II-5 of the Stipulation, Liberty National shall have no further obligation under the Settlement as to the lapsed policy or persons insured thereunder.

The foregoing list of benefits under the Settlement is NOT complete and does NOT list all of the terms and conditions contained in Stipulation. **You should read the Stipulation for complete details regarding the terms of the Settlement. The Stipulation shall govern implementation and enforcement of the Settlement, and nothing is this Notice varies the terms of the Stipulation.**

#### IV. DISMISSAL OF THE ACTION AND RELEASE OF CLAIMS

The Stipulation (Exhibit 1) [See page 19, below] provides, among other things, that, if the Settlement is approved by the Court, the relief then provided in the Settlement shall be the exclusive relief for any class member. If the Settlement is approved, this litigation and any and all claims asserted or which could have been asserted by or on behalf of any class member regarding the alleged cancer exchange programs or the Released Claims (as defined in Section III of the Stipulation) shall be dismissed in their entirety on the merits, and with prejudice. Effective upon the final approval of all aspects of this Settlement by the Circuit Court of Barbour County, Alabama, and the final, binding affirmance of said approval in the event of any appeal. Named Plaintiff, individually and on behalf of the Class, and each Class



Member, separately and severally, shall be deemed to have fully, finally, and forever released Liberty National and each of its past, present, and/or future: parents, subsidiaries, affiliated and related entities and persons, officers, employees, directors, shareholders, agents, successors, and assigns, separately and severally, of and from all claims, causes of action and liabilities (known or unknown) which have been or could be asserted by any Class Member, whether arising under state or federal statutory or common law, to the extent such claims, causes of action or liabilities arise from, are connected with, or are in any way based upon or related to any allegation of fraud, misrepresentation, concealment, failure to disclose, or other tortious conduct or breach of duty which occurred in whole or in part on or before the date of this Settlement Agreement, regarding (1) the alleged cancer policy exchange programs, or (2) any other transaction resulting in the issuance of a new policy providing coverage for a Class Member previously insured under an old policy, or (3) the failure to offer any Class Member a new policy (the "Released Claims").

If the Settlement of this class action pursuant to the Stipulation is approved, the Court will, pursuant to the Stipulation, enter an order barring and enjoining the parties, including each and all class members, either directly, individually, representatively, or in any other capacity, from instituting, filing, prosecuting or participating as a litigant (by intervention or otherwise) in any other action asserting or relating the alleged cancer exchange programs or any of the claims that are to be released under this Settlement. The Settlement, if approved, will be final and binding upon all members of the class. PROVIDED,

HOWEVER, THAT IF YOU WERE A NAMED PLAINTIFF IN ANY SEPARATE LAWSUIT FILED ON OR BEFORE MARCH 10, 1993 WHICH ALLEGED FRAUD, CONCEALMENT, FAILURE TO DISCLOSE OR MISREPRESENTATION IN CONNECTION WITH THE PURCHASE, SALE, ISSUANCE, EXCHANGE OR REPLACEMENT OF ANY ONE OR MORE LIBERTY NATIONAL CANCER POLICIES, THEN YOU ARE NOT A MEMBER OF THE CLASS AND YOUR INDIVIDUAL CLAIMS WILL NOT BE RELEASED, DISMISSED, OR OTHERWISE AFFECTED BY THIS LITIGATION, AND YOU WILL NOT BE ENTITLED TO ANY OF THE BENEFITS OF THIS SETTLEMENT (UNLESS YOUR LAWSUIT HAS BEEN VOLUNTARILY DISMISSED WITHOUT PREJUDICE ON OR BEFORE THE DATE THE SETTLEMENT IS FINALLY APPROVED BY THE CIRCUIT COURT).

#### **V. ATTORNEYS' FEES AND EXPENSES, AND EXPERT AND CONSULTANT FEES AND EXPENSES**

Counsel for Named Plaintiff and the Class intend to apply to the Court for a total award of attorneys' fees in an amount not to exceed \$4,500,000.00 and expenses in an amount not to exceed \$35,000.00, and an additional award of fees for experts and consultants employed by Class Counsel in an amount not to exceed \$150,000.00. The Court is NOT obligated to award the amount requested by Class Counsel. The Court is free to award whatever lesser amount the Court deems fit. However, under the terms of the Stipulation, the attorneys' fee award cannot exceed the total sum of \$4,500,000.00, and the award of expenses cannot exceed \$35,000.00, plus an

additional award of fees for experts and consultants employed by Class Counsel which cannot exceed \$150,000.00. Defendant Liberty National will not oppose an award of attorneys' fees not in excess of \$4,500,000.00 and expenses not in excess of \$35,000.00 nor additional fees not in excess of \$150,000.00 for experts and consultants employed by Class Counsel, which fees and expenses will be paid by Liberty National if and to the extent approved by the Court.

#### **VI. CERTAIN OF THE CONDITIONS OF THE SETTLEMENT**

The obligations of the parties under the Stipulation are conditioned on the entry of a Final Judgment approving the Stipulation of Settlement and dismissing with prejudice the litigation and all claims asserted or which could have been asserted by or on behalf of any Class Member relating to the alleged cancer policy exchange programs or to the Released Claims (as defined in Section III of the Stipulation). Other conditions of the Settlement are set forth in the enclosed Stipulation. In the event that the Stipulation and the Settlement are not approved by the Court, or if any such approval is not affirmed in the event of appeal, or if any condition of the Settlement is not met, or if the Settlement does not become effective for any reason whatsoever, or if the litigation is not dismissed in its entirety with prejudice and without taxable costs, then the Stipulation, the Settlement provided for in the Stipulation (including any modification thereto made with the consent of the named parties), the obligations of Liberty National under the Settlement, and any actions taken in connection therewith, will be terminated and

will become void and have no further force and effect except for the obligation of Liberty National to pay for any expense incurred in connection with this Notice.

#### **VII. RIGHT TO APPEAR**

At the Settlement Hearing on November 4, 1993 at 9:00 a.m., any member of the Class who objects to the terms and conditions of the Stipulation; to the fairness, reasonableness or adequacy of the Settlement; to the maintenance of the action, for purposes of settlement, as a class action pursuant to Rule 23(b)(2) of the Alabama Rules of Civil Procedure; to the procedures adopted by the court for approval of the Settlement; to the binding effect of the Settlement on all members of the class; to the judgment to be entered; to any findings or orders of the Court; to the contents and method of delivery of this Notice; to the award of attorneys' fees requested by the Named Plaintiff and his counsel; to the provisions in the Settlement that any settlement proceeds or restitution determined to be due shall be paid to the Named Insured on the policy in force at the time of the treatment at issue, regardless of which Covered Person under the policy received the treatment at issue; or to any other matter pertaining to this proposed Settlement, may appear in person or by his attorney and present any evidence that may be proper and relevant. PROVIDED, HOWEVER, THAT NO CLASS MEMBER (OTHER THAN NAMED PLAINTIFF) SHALL BE HEARD, AND NO PAPERS, BRIEFS, PLEADINGS OR OTHER DOCUMENTS SUBMITTED BY SUCH CLASS MEMBER SHALL BE RECEIVED OR CONSIDERED BY THE COURT (UNLESS



THE COURT IN ITS DISCRETION SHALL OTHERWISE DIRECT, UPON APPLICATION OF SUCH CLASS MEMBER AND FOR GOOD CAUSE SHOWN), UNLESS NO LATER THAN OCTOBER 10, 1993 THE CLASS MEMBER FILES WITH THE CLERK OF THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA THE FOLLOWING: (i) a notice of intention to appear; (ii) a short plain statement of such person's objections to any matter before the court; and (iii) a short, plain statement of the grounds of objection and any reasons for such persons desiring to appear and be heard, as well as a copy of all briefs, supporting papers, documents and writings which such Class Member desires the Court to consider. Any such written notice and objection, as well as any briefs, supporting papers or other documents thus filed by any Class Member shall also be served by such Class Member upon each of the following counsel of record at least ten (10) days prior to the date of the Settlement Hearing:

Jere Beasley  
Counsel for named plaintiff and the class  
Beasley, Wilson  
P.O. Box 4160  
Montgomery, Alabama 36103-4160

James W. Gewin  
Counsel for Defendant Liberty National  
Life Insurance  
Bradley, Arant, Rose & White  
1400 Park Place Tower  
Birmingham, Alabama 35203

Unless the Court otherwise directs, no member of the Class shall be entitled to object to or otherwise be heard with respect to the approval of the Stipulation; the fairness, reasonableness and adequacy of the Settlement; the

maintenance of the action as a class action pursuant to Alabama Rule of Civil procedure 23(b)(2); the contents or method of delivery of the notice; any orders or findings entered by the Court; the procedures adopted by the Court for consideration or approval of the Settlement; the binding effect of the Settlement on the members of the Class; any judgment to be entered; or the award of attorneys' fees and expenses to Named Plaintiff's counsel; or any other matter pertaining to the approval or disapproval of the Settlement, except by serving and filing written objections as prescribed above. Any Class Member who fails to object in the manner prescribed above shall be deemed to have waived all such objections and any other objections relating to the subject matter of the litigation or the Settlement, and shall be barred forever from raising such objections or relitigating his individual claims in this or any other action or proceeding.

#### VIII. ORDER BARRING FURTHER LITIGATION PENDING FINAL APPROVAL OR DISAPPROVAL OF SETTLEMENT

Pending final determination of whether the Settlement of this action pursuant to the Stipulation is fair, reasonable and adequate and should be approved, the Court has ordered that Named Plaintiff, and all members of the Class described above, are enjoined and prohibited from prosecuting, filing, maintaining, pursuing, or participating as a litigant (by intervention or otherwise), either directly, individually, or representatively, or in any other capacity, any separate action asserting any claims which are or relate to the Released Claims as defined in Section III of the Stipulation.



## IX. SCOPE OF THIS NOTICE

The foregoing description of the Settlement Hearing, the litigation, the class determination, the terms of the Settlement, and other matters described herein, does not purport to be exhaustive or comprehensive. Accordingly, Class Members are referred to the attached Stipulation, and to the other documents filed with the Court in the Litigation, all of which may be examined by you or your attorney during regular business hours of each business day at the offices of the Clerk of the Circuit Court of Barbour County, Alabama, Barbour County Courthouse, Court Square, Clayton, Alabama. Additional copies of this notice are available from Class Counsel upon written request directed to the Special Master, [name and address]

This notice issued by order of the Court.

WILLIAM H. ROBERTSON  
Circuit Judge

DATED:  
June 16, 1993

NOTE: THE PAGES WHICH FOLLOW CONTAIN THE FOLLOWING DOCUMENTS WHICH THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA HAS ORDERED TO BE DELIVERED TO YOU AS ATTACHMENTS TO THE FOREGOING NOTICE:

PROOF OF CLAIM FORM .....pp. 9-14  
ORDER WITH RESPECT TO PROPOSED SETTLEMENT  
.....pp. 15-18  
STIPULATION AND AGREEMENT OF COMPROMISE  
AND SETTLEMENT ("STIPULATION") .....pp. 19-28  
ORDER AND FINAL JUDGMENT [PROPOSED] pp. 29-31

## PROOF OF CLAIM FORM FO2 POSSIBLE REIMBURSEMENT OF CERTAIN CANCER CLAIMS PURSUANT TO CLASS ACTION SETTLEMENT

**NOTICE: PLEASE READ THE NOTICE AND STIPULATION ENCLOSED BEFORE SUBMITTING THIS FORM. THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA HAS DIRECTED THAT THIS CLAIM FORM BE DELIVERED TO YOU PURSUANT TO A CLASS ACTION SETTLEMENT DESCRIBED IN THE NOTICE AND THE STIPULATION ENCLOSED HEREWITH, THE INFORMATION REQUESTED IN THIS FORM WILL HELP THE COURT TO DETERMINE IF YOU ARE ENTITLED TO CERTAIN BENEFITS UNDER THE CLASS SETTLEMENT IF THE SETTLEMENT IS APPROVED BY THE COURT.**

**YOU DO NOT WAIVE YOUR RIGHT TO OBJECT TO THE SETTLEMENT OR TO APPEAL FROM ANY FINAL ORDER APPROVING THE SETTLEMENT BY SUBMITTING THIS FORM. IF THE SETTLEMENT IS NOT APPROVED, YOUR RIGHTS WILL NOT BE PREJUDICED BY THE FILING OF THIS FORM. IF THE SETTLEMENT IS APPROVED, ONLY PERSONS WHO SUBMIT THIS FORM AND WHO ALSO QUALIFY UNDER THE TERMS OF THE SETTLEMENT WILL BE ELIGIBLE TO RECEIVE CERTAIN BENEFITS UNDER THE SETTLEMENT, THE BENEFITS AND ELIGIBILITY REQUIREMENTS ARE FULLY EXPLAINED IN THE STIPULATION WHICH IS ATTACHED.**

### DEFINITION

The following words or phrases, whenever they appear in this Proof of Claim Form, shall have the following meaning ascribed to them, and the singular includes the plural, and the plural the singular:

1. "Old Policy" and "Old Cancer Policy" shall mean any cancer insurance policy or policies issued by Liberty National Life Insurance Company ("Liberty National") which (i) contained no monetary limits or exclusions of benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, and (ii) which was issued prior to August 29, 1986.

2. "New Policy" and "New Cancer Policy" shall mean any cancer insurance policy or policies issued by Liberty National on or after August 29, 1986 which contained monetary limits upon or exclusions of benefits for otherwise covered radiation, chemotherapy, and prescription chemotherapy drugs and provided no benefits or coverage for other out-of-hospital prescription drugs.

3. "Class" shall mean the Class certified by the Barbour County Circuit Court as described on page 1 of the enclosed Notice, and "Class members" means persons who are members of that "Class".

4. "Named Insured" or "policyholder" shall mean the person listed as "insured" on the face of the policy, and to whom benefits under the policy for the treatment of persons covered under the policy are payable by the terms of the policy.

5. "Covered persons" shall mean dependents of the named insured who are covered persons within the meaning of the applicable policy.

6. "Other out-of-hospital prescription drugs" or "other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer" shall mean all prescription drugs, other than prescription chemotherapy drugs, prescribed for any covered person with a diagnosis of cancer for use outside of a hospital in the (i) treatment of cancer, or (ii) treatment of the effects of cancer or of cancer treatment.

**INSTRUCTIONS:** Class Members are entitled to submit this claim form *only if*

(1) you at one time owned or were insured under an old policy of cancer insurance issued by Liberty National Life Insurance Company on or *before* August 29, 1986; *and*

(2) you thereafter were a named insured under a new policy of cancer insurance issued by Liberty National Life Insurance Company *after* August 29, 1986; *and*

(3) you or someone insured under your new policy has in the past been diagnosed as having cancer; *and*

(4) *since* August 29, 1986 you have submitted to Liberty National one or more claims under your new policy for radiation treatment, chemotherapy treatment, prescription chemotherapy drugs, or out-of-hospital prescription drugs administered to a covered person under your new policy in connection with the treatment of cancer; *and*



(5) Liberty National did *not* pay the full amount of the expenses incurred since August 29, 1986 for radiation treatment, chemotherapy, prescription chemotherapy drugs, or out-of-hospital prescription drugs administered to a covered person under your new policy in connection with the treatment of cancer.

IF YOU FIT THE ABOVE DESCRIPTION OF PERSONS ENTITLED TO SUBMIT THIS CLAIM FORM, YOU MUST SUBMIT THIS CLAIM FORM ON OR BEFORE DECEMBER 20, 1993. IF YOU DO NOT SUBMIT THIS CLAIM FORM BY THAT DATE, YOU WILL NOT BE ELIGIBLE FOR ANY OF THE MONETARY BENEFITS OF THE SETTLEMENT DESCRIBED IN PARAGRAPHS II-9, II-10, II-11, AND II-12 OF THE ENCLOSED "STIPULATION AND AGREEMENT OF COMPROMISE AND SETTLEMENT" ("STIPULATOIN"). YOU WILL REMAIN ELIGIBLE FOR THE NON-MONETARY BENEFITS OF THE SETTLEMENT WHETHER OR NOT YOU SUBMIT THIS FORM.

IF YOU SUBMIT THIS FORM, YOU MUST ATTACH COPIES OF MEDICAL BILLS OR OTHER DOCUMENTS SUFFICIENT TO SHOW THE COST AND DATE OF EACH RADIATION TREATMENT, CHEMOTHERAPY TREATMENT, PRESCRIPTION CHEMOTHERAPY DRUG EXPENSE, AND OUT-OF-HOSPITAL DRUG EXPENSE WHICH YOU CLAIM WAS NOT FULLY PAID BY LIBERTY NATIONAL LIFE INSURANCE COMPANY.

IF YOU ARE OR WERE THE ADMINISTRATOR OR EXECUTOR OF A CLASS MEMBER WHO IS DECEASED BUT WHO OTHERWISE WOULD BE ENTITLED TO SUBMIT THIS PROOF OF CLAIM FORM UNDER

INSTRUCTIONS (1) THROUGH (5) ABOVE, PLEASE READ PARAGRAPH II-13 OF THE ENCLOSED STIPULATION FOR FURTHER INSTRUCTIONS.

If you submit this form, you will be notified at a later date of the initial determination as to whether you are entitled to any monetary benefits under the Settlement. ANY MONETARY BENEFITS PAYABLE UNDER THE SETTLEMENT WILL BE PAID TO THE PERSON LISTED AS THE NAMED INSURED (THE POLICY OWNER) ON THE POLICY IN FORCE AT THE TIME OF THE CANCER TREATMENT AT ISSUE.

Your entitlement to benefits will be determined in accordance with the terms of a Class Action Settlement (the "Stipulation"), a copy of which is enclosed, and additional copies of which may be reviewed during regular business hours at the Office of the Clerk of the Circuit Court of Barbour County, Alabama, located in Clayton, Alabama. IF YOU DO NOT SUBMIT THIS FORM BEFORE DECEMBER 20, 1993 YOU WILL NOT BE ELIGIBLE FOR MONETARY BENEFITS UNDER THE SETTLEMENT. PERSONS WHO SUBMIT THIS FORM BUT ARE NOT MEMBERS OF THE CLASS, OR WHO ARE NOT "ENTITLED TO SUBMIT THIS FORM" AS DESCRIBED IN INSTRUCTIONS (1) THROUGH (5) ABOVE, WILL NOT BE ELIGIBLE FOR MONETARY BENEFITS UNDER THE SETTLEMENT.

**PLEASE PROVIDE THE FOLLOWING INFORMATION:**

1. State whether you were *ever* insured under a policy of cancer insurance issued by Liberty National Life Insurance *before* August 29, 1986.



Yes \_\_\_\_\_ No \_\_\_\_\_

Policy number (if known): \_\_\_\_\_  
Named Insured (Policy Owner) \_\_\_\_\_

2. State whether you are or were the named insured under a policy of cancer insurance issued by Liberty National Life Insurance Company *after* August 29, 1986.

Yes \_\_\_\_\_ No \_\_\_\_\_

Policy number (if known): \_\_\_\_\_  
Named Insured (Policy Owner) \_\_\_\_\_

3. State whether you or any person(s) insured under a Liberty National cancer policy owned by you has received treatment for cancer since August 29, 1986.  
Yes \_\_\_\_\_ No \_\_\_\_\_ State the full names and dates of birth of each person covered by your policy who received cancer treatment since August 29, 1986:
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

4. State whether, after August 29, 1986, you submitted any bills to Liberty National for radiation treatment, chemotherapy treatment, or prescription chemotherapy drugs, or submitted any bills or incurred any expenses for other out-of-hospital prescription drugs prescribed to you or a covered person insured under your policy. Yes \_\_\_\_\_ No \_\_\_\_\_

**NOTE:** If you answered "Yes" to questions 1, 2, 3 and 4 above, then provide the additional information requested below. If you answered "No" to *any* one of questions 1, 2, 3 and 4 above, you are not eligible for monetary benefits under the proposed settlement and therefore you should *not* complete the rest of this Proof of Claim Form

and you should not submit this Proof of Claim Form.

5. State whether Liberty National reimbursed you for the full amount of the bills submitted to Liberty National for radiation treatment, chemotherapy treatment, prescription chemotherapy drugs, and expenses incurred for other out-of-hospital prescription drugs administered to any covered person under your new policy in connection with the treatment of cancer since August 29, 1986? Yes \_\_\_\_\_ No \_\_\_\_\_

**NOTE:** If you answered "yes" to question 5, then you are not eligible for monetary benefits under the proposed Settlement and therefore you should *not* complete the rest of this Proof of Claim Form and you should *not* submit this Proof of Claim Form. If you answered "No" to question 5, then please provide the additional information requested below:

6. **NOTE:** THE INFORMATION REQUESTED IN ITEM 6 WILL NOT REDUCE ANY BENEFITS TO WHICH YOU MAY BE ENTITLED UNDER THE SETTLEMENT, BUT MAY BE USED TO VERIFY DATES AND TYPES OF TREATMENT IN CONNECTION WITH YOUR CLAIM. To assist Liberty National in obtaining any additional information that may be necessary concerning this claim, please state the name of all insurance companies (other than Liberty National) and other health insurance or health care plans (including any employer-sponsored health benefit plans) who paid for any portion of the cancer treatment received *by you or by any person insured* under your policy:
- \_\_\_\_\_
- \_\_\_\_\_

7. Please fill out the table on the following page to show the bills submitted to Liberty National since August 29, 1986 for radiation treatment, chemotherapy treatment, and prescription chemotherapy drugs, and bills submitted or expenses incurred since August 29, 1986 for out-of-hospital prescription drugs. You should list this information for each person insured under your policy who has received treatment for cancer. **YOU SHOULD LIST ONLY THOSE ITEMS FOR WHICH YOU CONTEND YOU HAVE NOT ALREADY BEEN FULLY REIMBURSED BY LIBERTY NATIONAL.**

**NOTE:** IF YOU SUBMIT THIS FORM, YOU MUST ATTACH COPIES OF BILLS, INVOICES OR OTHER DOCUMENTS WHICH VERIFY THAT YOU RECEIVED THE TREATMENT OR DRUGS INDICATED. IF YOU DO NOT ALREADY HAVE COPIES, YOU SHOULD GET COPIES OF SUCH BILLS, INVOICES OR OTHER DOCUMENTS FROM THE DOCTORS, HOSPITALS, OR OTHER PROVIDERS WHO TREATED YOU OR BILLED YOU FOR THE LISTED TREATMENTS OR DRUGS. IF YOU RECEIVED ANY LETTER OR WRITTEN STATEMENT FROM LIBERTY NATIONAL REGARDING ANY OF THE TREATMENTS OR DRUG EXPENSES LISTED, PLEASE ATTACH COPIES OF THOSE DOCUMENTS AS WELL IF YOU STILL HAVE THEM.

Type of Expense or Treatment	Dates of Expense or Treatment (if any)	Amount Charged By Provider for Treatment	Name and Date of Birth of Person Treated	Portion Not Paid By Liberty National (if any)
A. Radiation				
B. Chemotherapy				
C. Prescription Chemotherapy Drugs				
D. Out-of-Hospital Prescription Drugs				

8. I HAVE READ THIS FORM AND I HEREBY SWEAR OR AFFIRM UNDER PENALTY OF PERJURY THAT I HAVE COMPLETED THIS FORM TRUTHFULLY TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION. I HEREBY AUTHORIZE LIBERTY NATIONAL LIFE INSURANCE COMPANY TO OBTAIN COPIES OF ALL MEDICAL RECORDS PERTAINING TO THE CLAIMS MADE HEREIN FROM ANY INSURER OR PROVIDER OR PHYSICIAN HAVING SUCH RECORDS SO THAT MY CLAIM CAN BE VERIFIED.

\_\_\_\_\_  
Sign Your Name Here

\_\_\_\_\_  
Print Your Full Name

\_\_\_\_\_  
Your Maiden Name (if applicable)

\_\_\_\_\_  
Your Former Name (if you have divorced or remarried)

\_\_\_\_\_  
Print Your Address: \_\_\_\_\_

\_\_\_\_\_  
Your Date of Birth: \_\_\_\_\_

\_\_\_\_\_  
Your Social Security Number: \_\_\_\_\_

\_\_\_\_\_  
Other Addresses at Which You Have Resided Since August 29, 1986: \_\_\_\_\_

[NOTE: THE INSTRUCTIONS FOR MAILING THIS FORM AND CERTAIN ADDITIONAL INFORMATION APPEAR ON THE NEXT PAGE].

IMPORTANT: YOU MUST MAIL THIS FORM AND COPIES OF THE DOCUMENTS DESCRIBED IN ITEM 7 TO:

**SPECIAL MASTER**  
**P.O. BOX 1449**  
**EUFAULA, AL 36072-1449**

THE SPECIAL MASTER WILL THEN SUBMIT A COPY OF THE FORM TO LIBERTY NATIONAL LIFE INSURANCE COMPANY AND WILL FILE THE ORIGINAL OF THE CLAIM WITH THE CLERK OF THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA. YOU WILL BE NOTIFIED IN WRITING OF LIBERTY NATIONAL'S PRELIMINARY DETERMINATION AS TO WHETHER YOU ARE ENTITLED TO PAYMENT OF ANY ADDITIONAL AMOUNTS PURSUANT TO THE SETTLEMENT OF THE CLASS ACTION DESCRIBED TO YOU IN THE NOTICE RECEIVED BY YOU FROM THE CLERK OF THE COURT. LIBERTY NATIONAL'S DETERMINATION WILL BE BINDING UPON YOU UNLESS YOU THEN REQUEST A SPECIAL HEARING IN WRITING ADDRESSED TO THE SPECIAL MASTER AT THE ADDRESS SHOWN ABOVE. YOU WILL HAVE THIRTY (30) DAYS TO REQUEST A SPECIAL HEARING, AND IF YOU DO SO YOU WILL HAVE AN OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THIS CLAIM TO THE SPECIAL MASTER APPOINTED BY THE COURT TO RESOLVE THESE CLAIMS. YOU WILL BE NOTIFIED AT LEAST THIRTY (30) DAYS IN ADVANCE OF THE



DATE AND TIME OF THIS HEARING. IN THE EVENT OF ANY DISPUTE, THE RECOMMENDATION OF THE SPECIAL MASTER FOLLOWING SAID HEARING WILL BE SUBMITTED TO THE CIRCUIT COURT FOR REVIEW, AND THE COURT SHALL THEN MAKE A FINAL DECISION ON YOUR CLAIM. A CHECK FOR THE FINAL AMOUNT DETERMINED TO BE DUE TO YOU UNDER THE SETTLEMENT WILL BE MAILED TO YOU AT SUCH TIME AS THE COURT HAS DETERMINED ALL CLAIMS SUBMITTED PURSUANT TO THE SETTLEMENT. IF YOU ARE NOT SATISFIED WITH THE SPECIAL MASTER'S RULING, YOU WILL BE GIVEN NOTICE OF AN OPPORTUNITY TO REQUEST A SPECIAL HEARING BY THE COURT ON YOUR PROOF OF CLAIM AT THAT TIME. YOU MUST SUBMIT YOUR CLAIM FORM NO LATER THAN DECEMBER 20, 1993 OR YOUR CLAIM WILL BE WAIVED.

/s/  
 \_\_\_\_\_  
 CIRCUIT CLERK

[NOTE: PLEASE DETACH THIS PROOF OF CLAIM FORM FROM BOOKLET BEFORE MAILING]

[NOTE: THIS ORDER WAS ENTERED BY THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA ON JUNE 16, 1993.]

IN THE CIRCUIT COURT OF  
 BARBOUR COUNTY, ALABAMA  
 Clayton Division

CHARLIE FRANK ROBERTSON,	)	
for himself, and in his	)	
representative capacity for the	)	
class of persons described	)	
herein,	)	
Plaintiffs,	)	Case Number
	)	CV-92-021
vs.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant.	)	
_____	)	

ORDER WITH RESPECT TO  
 PROPOSED SETTLEMENT

(Filed June 16, 1993)

The parties to the above-captioned action having applied for an Order determining certain matters in connection with a proposed settlement in accordance with the Stipulation and Agreement of Compromise and Settlement ("the Stipulation" or "the Settlement"), and the Court having heretofore entered an order certifying this action as a Class Action;

NOW, upon the motion of the parties, after consideration of the Stipulation (Exhibit 1 hereto) and the exhibits

annexed thereto, and after due deliberation, and consideration of the totality of the circumstances and the record, and for good cause shown, it is hereby

ORDERED, that:

1. The terms of the Settlement are preliminary [sic] approved, subject to further consideration thereof at the Settlement hearing described below. The parties shall have twenty (20) days to make any modifications or corrections to the Stipulation or its exhibits which they mutually agree to be necessary, subject to further approval of the Court. Thereafter, modifications shall not be permitted except by mutual agreement by leave of Court with good cause shown.

2. The Court hereby reaffirms that this action shall be maintained as a Class Action pursuant to *Alabama Rule of Civil Procedure 23(b)(2)*, by the Named Plaintiff as Class Representative and by the Named Plaintiff's counsel as Class Counsel, on behalf of a Class consisting of the following:

"All persons who now or in the past were insured under any cancer policy which (1) was issued by Liberty National Life Insurance Company ("Liberty National") on or before August 29, 1986, and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; *provided, however*, that (i) any individual insured who is or was a

named plaintiff in any separate lawsuit against Liberty National which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the Class *unless* such lawsuit has been voluntarily dismissed without prejudice on or before the date this Settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any individual insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the Class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the Class."

The description of the Class described herein shall clarify and relate back to the date of the prior Class certification order heretofore entered by the Court.

3. The Court finds for the purposes of settlement that the Named Plaintiff and Class Counsel are adequate representatives of and Counsel for the Class respectively, and that all requirements of A.R.C.P. 23(a) and 23(b)(2) are met. The Court expressly finds [sic], for purposes of these Settlement proceedings, that the Class is so numerous that the joinder of all members is impracticable; that Class Counsel is experienced and has adequately represented and will adequately represent the Class; that there are questions of law and fact common to the Class; the claims of Named Plaintiff are typical of the claims of



the Class; that Named Plaintiff is an adequate representative of the Class; and that the representative parties have fairly and adequately protected the interests of the Class and will continue to do so. The Court finds that maintenance of this action as a Class Action pursuant to the Ala.R.Civ.P. 23(b)(2) is superior to any other means of adjudicating the claims herein raised. The Court further finds, for purposes of these Settlement proceedings, that Defendant's alleged conduct is generally applicable to the Class, thereby making appropriate injunctive and equitable relief with respect to the Class as a whole. The Court further finds, for purposes of these Settlement proceedings, that maintenance of this action pursuant to Rule 23(b)(2) is superior to maintenance of this action pursuant to *Alabama Rule of Civil Procedure* 23(b)(3), in that the vast majority of Class Members have not suffered cancer and have incurred little or no actual monetary damage as a result of the matters made the basis of the complaint. Moreover, the primary relief justified by the conduct alleged and the primary relief under the Settlement is injunctive relief whereby the Defendant would be enjoined from enforcing certain policy limitations, to effect a reformation of certain policies, and to make restitution and other monetary relief available to certain Class Members incidental to the primary equitable relief. The Court finds that all monetary relief provided by the Settlement is secondary and incidental to the primary injunctive and equitable relief. In these circumstances, the Courts [sic] finds that certification pursuant to Rule 23(b)(2) would best facilitate the provision of maximum relief to the entire Class as a whole, including those who have suffered no damage or purely speculative damage at

the present time but could otherwise arguably suffer damage in the future.

4. A hearing shall be held on November 4, 1993 at 9:00 a.m. at the Barbour County Courthouse in Clayton, Alabama. The purposes of the hearing shall be (a) to determine whether the proposed Settlement on the terms and conditions of the Stipulation is fair, reasonable, and adequate and should be approved by the Court; (b) to determine whether Final Judgment should be entered in this action pursuant to the proposed Settlement; (c) to entertain any objections of any affected person(s) as to the certification of the Class, the proposed Settlement, or any other matter related thereto; and (d) to rule on all other matters pertaining to the proposed Settlement and such other matters as the Court may deem appropriate.

5. The Court reserves the right to adjourn the hearing without further notice of any kind other than oral announcement at the hearing.

6. The Court reserves the right following the hearing to approve the Settlement with or without modification and with or without further notice of any kind.

7. Liberty National shall use its best efforts to cause notice to be given to all persons identified as members of the Class, in accordance with this Order, as follows:

a. Not later than sixty (60) days after the entry of this Order, mail (by first class mail, postage prepaid) a Notice of Hearing and Settlement substantially in the form of Exhibit B to the Stipulation (the "notice") to each of the following persons whose identities and last known



addresses are reasonably ascertainable from Liberty National's records; all persons listed as the named insured on Liberty National cancer insurance policies which are presently in force; all persons who were listed as the named insured on Liberty National cancer policies which were issued prior to August 29, 1986 and which were in force or in the grace period as of that date; and all persons who are listed as the named insured under each "new policy" (as that term is defined in the Stipulation) pursuant to which any claim for radiation, chemotherapy, prescription chemotherapy drugs, or out-of-hospital prescription drugs prescribed in the treatment of cancer has been submitted (to Liberty National) since August 29, 1986. Provided, however, that Liberty National need not send notice to any such person whom Liberty National can identify from its records as being a person who is not a member of the Class. The notice shall include a copy of the Stipulation, as well as a copy of this Order, the proof of claim form contemplated by the Stipulation and a copy of the proposed Order and Final Judgment attached as Exhibit E to the Stipulation.

b. With respect to any notices which are returned by the postal service undelivered, Liberty National shall use its best efforts to identify the present address of the intended recipient and to mail or personally deliver notice to each such individual no later than thirty (30) days in advance than [sic] the fairness hearing.

c. Not later than seventy-five (75) days after the entry of this Order, Liberty National shall cause to be published in the legal notices section of the following newspapers: *Clayton*

*Record*, Clayton, Alabama; *Eufaula Tribune*, Eufaula, Alabama; *Union Springs Herald*, Union Springs, Alabama; *Mobile Press Register*, Mobile, Alabama; *Montgomery Advertiser/Journal*, Montgomery, Alabama; *Birmingham News*, Birmingham, Alabama; *Huntsville Times*, Huntsville, Alabama; *Dothan Eagle*, Dothan, Alabama; *Anniston Star*, Anniston, Alabama; and *USA Today*, and at least one major newspaper (within the top three in circulation) in each other State in which Liberty National cancer policies are approved for issuance a one-time summary notice of the hearing and Settlement, substantially in the form attached hereto as Exhibit B-1, including the name and address of Class Counsel from whom copies of the notice can be obtained upon request;

d. At least 7 days prior to the hearing, Liberty National and Class Counsel shall file or cause to be filed a proof of distribution of the notice in accordance with this paragraph 7. Said proof shall be in the form of affidavits executed by an appropriate representative of Liberty National and by Class Counsel verifying their compliance with the provisions of this paragraph 7.

8. The Court finds that the form and method of notice specified herein is the best notice practicable under the circumstances, and, if carried out, shall constitute due and sufficient notice of the Settlement and all other matters addressed in the notice and its exhibits, including without limitation, the pendency of this action, the maintenance of this action as a Class Action pursuant to Alabama Rule of Civil Procedure 23 (b) (2), the terms of Settlement, the binding effect of the Settlement on all

members of the Class, and the hearing, to all persons entitled to receive such notice. The notice attached as Exhibit B to the Stipulation is hereby approved.

9. Any briefs or other documents in support of the Settlement and in support of Named Plaintiff's request for an award of attorneys' fees and expenses shall be filed by the parties with the Clerk of the Court not less than 3 days prior to the Settlement hearing.

10. Any member of the Class may appear at the hearing, in person or by counsel (if an appearance is filed and served as hereinafter provided), and be heard to the extent allowed by the Court in support of, or in opposition to the fairness, reasonableness and adequacy of the Settlement, the terms and conditions of the Settlement, the Final Judgment to be entered herein, the procedures adopted by the Court for its determination of whether to approve the Settlement, including but not limited to, maintenance of the action pursuant to *Alabama Rule of Civil Procedure 23(b)(2)*, the binding effect of the Settlement on all members of the Class, the content and method of delivery of the notice, any orders or findings entered by the Court, Class Counsel's request for an award of attorneys' fees and expenses, and all other matters pertaining to this proposed Settlement. PROVIDED, HOWEVER, THAT NO CLASS MEMBER SHALL BE HEARD OR ENTITLED TO CONTEST SUCH MATTERS UNLESS THAT CLASS MEMBER HAS SERVED, NOT LESS THAN 10 DAYS BEFORE THE HEARING, BY HAND DELIVERY OR FIRST CLASS MAIL, POSTAGE PREPAID, WRITTEN OBJECTIONS AND COPIES OF ANY SUPPORTING PAPERS AND BRIEFS (WHICH

MUST CONTAIN PROOF OF MEMBERSHIP IN THE CLASS) UPON THE FOLLOWING COUNSEL:

Designated recipient for Named Plaintiff: Jere Beasley, Beasley, Wilson, Allen, Main & Crow P.C.  
P.O. Box 4160, Montgomery, Alabama 36103-4160

Designated recipient for Defendant: James Gewin, Bradley, Arant, Rose & White  
1400 Park Place Tower, Birmingham, Alabama 35203

AND UNLESS THAT CLASS MEMBER HAS ALSO FILED SUCH OBJECTION, PAPERS AND BRIEFS, SHOWING DUE PROOF OF SERVICE UPON NAMED PLAINTIFF'S DESIGNATED RECIPIENT AND DEFENDANT'S DESIGNATED RECIPIENT, WITH THE CLERK OF THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA, CLAYTON, ALABAMA, COURTHOUSE, COURT SQUARE, CLAYTON, ALABAMA 36016 ON OR BEFORE OCTOBER 10, 1993. NO PARTICULAR FORM OF WRITTEN OBJECTION IS REQUIRED. A SHORT, PLAIN STATEMENT OF EACH OBJECTION AND THE GROUNDS THEREFOR WILL BE SUFFICIENT. CLASS MEMBERS WHO WISH TO OBJECT MAY, BUT ARE NOT REQUIRED TO, OBTAIN COUNSEL AT THEIR OWN EXPENSE TO REPRESENT THEM IN CONNECTION WITH ANY SUCH OBJECTION. HANDWRITTEN OBJECTIONS WILL BE CONSIDERED.

11. Unless the Court otherwise directs, no member of the Class shall be entitled to be heard or object with respect to the fairness, reasonableness, or adequacy of the Settlement, the terms and conditions of the Settlement, any Final Judgment to be entered herein, the procedures adopted by the Court to consider approval of the Settlement, the binding effect of the Settlement on all members



of the Class, the maintenance to [sic] the action as a Class Action pursuant to Alabama Rule of Civil Procedure 23 (b) (2), the content and method of delivery of the notice, or any orders or findings entered by the Court, or any other matter pertaining to approval or disapproval of the Settlement, unless such Class Member shall have first served and filed written objection as prescribed above. Any Class Member who fails to object in the manner prescribed above shall be deemed to have waived all such objections and any other objections relating to the subject matter of the litigation, and shall be forever barred from raising such objections or relitigating his individual claims in those or any other action or proceeding. Each Class Member desiring to object must file his own objection and appear personally or by counsel. No Class Member will be heard to assert purported objections of any other Class Member.

12. Pending final determination of whether the Settlement should be approved, the Named Plaintiff and all members of the Class are hereby enjoined and prohibited from commencing or prosecuting any action, either directly, individually, representatively, or in any capacity, asserting any claims which are proposed to be released pursuant to this Settlement (Released Claims, as defined in Section III of the Stipulation). Provided, however, that this Order shall not restrict the prosecution of the individual claims of any person who was a named plaintiff in any suit filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies.

13. If the Settlement (including any modification thereto with the consent of the parties made as provided for in the Stipulation) is approved by the Court following the hearing, an Order and Final Judgment substantially in the form annexed to the Stipulation as Exhibit 2 may be entered: (i) approving the final certification of the Class described in paragraph 2 hereof; (ii) approving the Settlement and all transactions preparatory or incidental thereto and all terms and conditions of the stipulation as valid, fair, reasonable, and adequate, and directing consummation of the Settlement in accordance with the terms and provisions of the Stipulation; (iii) enters a final injunction and other declaratory and equitable relief permanently enjoining and requiring Liberty National to perform its obligations (including reformation of the new policies, ancillary restitution and the ancillary monetary relief) set forth in this Settlement Agreement (the "Injunction"), and subject to said Injunction and the right to enforcement thereof pursuant to the continuing jurisdiction reserved by the Court, approves the release of and dismisses with prejudice all claims asserted or which could have been asserted in this Litigation by or on behalf of the Class Members or any of them against the Defendant relating to the alleged cancer policy exchange programs or to the Released Claims as defined in Section III of the Stipulation; (iv) permanently barring and enjoining each and all Class Members from filing or participating as a litigant in any individual lawsuit or class action relating to the alleged cancer exchange programs or asserting any of the Released Claims (as defined in Section III of the Stipulation); and (v) reserving jurisdiction over all matters related to the administration,



consummation, interpretation, and enforcement of the Stipulation and Settlement.

14. Those Class Members who are described in paragraphs II-9, II-10, and II-12 of the Stipulation and who otherwise qualify thereunder for the restitution and ancillary monetary relief provided in those paragraphs must submit completed proof of claim forms to Class Counsel, in accordance with the instructions set forth on the proof of claim form, no later than December 20, 1993 (120 days after the deadline for the mailing of the notice described in paragraph 7(a) of this Order). This deadline must be complied with regardless of whether the person eligible to submit the proof of claim form objects to the Settlement. If the Settlement is not approved by this Court, or if the approval of the Settlement is set aside by an appellate court, a Class Member's submission of the proof of claim form shall in no way prejudice the rights of said Class Member in any subsequent litigation. If the Settlement is ultimately approved and affirmed in the event of any appeal, the restitution and ancillary monetary relief provided for in paragraphs II-9, II-10, and II-12 of the Stipulation shall be payable only to those persons who submit true and proper claim forms on or before December 20, 1993 and otherwise qualify for said relief under the terms of the Stipulation. The filing of a proof of claim form shall not waive or preclude the claimant's right to object to or appeal from this Settlement.

15. If the Settlement is not approved by the Court or shall not become effective for any reason whatsoever, then, and in that event, the Settlement proposed in the

Stipulation and any actions taken or to be taken in connection therewith (including this Order and any judgment entered herein) shall be terminated and shall become void and have no further force and effect except for Liberty National's obligation to pay for any expenses incurred in connection with the notice provided for by this Order, and incurred in the employment of an actuarial expert for Class Counsel.

DONE, ORDERED, ADJUDGED AND DECREED,  
this 16th day of June, 1993.

/s/ William H. Robertson  
CIRCUIT JUDGE

["Stipulation"]  
[EXHIBIT 1  
to Notice]

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, for  
himself, and in his representative  
capacity for the class of persons  
described herein,

Plaintiff,

vs.

LIBERTY NATIONAL LIFE  
INSURANCE COMPANY,

Defendant.

Case Number:  
CV-92-021

### STIPULATION AND AGREEMENT OF COMPROMISE AND SETTLEMENT

The parties to the above-captioned civil action (the "Litigation"), Charlie Frank Robertson, for himself ("Named Plaintiff") and as Class Representative, and Liberty National Life Insurance Company ("Defendant"), for itself and both by and through their respective attorneys, have entered into the following Stipulation and Agreement of Compromise and Settlement (the "Stipulation" or the "Settlement") subject to the approval of the Court.

### DEFINITIONS

The following words or phrases, whenever they appear in this Agreement, shall have the following meaning ascribed to them, and the singular includes the plural, and the plural the singular:

1. "Old Policy" and "Old Cancer Policy" shall mean any cancer insurance policy or policies issued by Liberty National Life Insurance Company ("Liberty National") which (i) contained no monetary limits or exclusions regarding benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs, and (ii) which was issued prior to August 29, 1986.

2. "New Policy" and "New Cancer Policy" shall mean any cancer insurance policy or policies issued by Liberty National on or after August 29, 1986 which contained monetary limits upon or exclusions of benefits for otherwise covered radiation, chemotherapy, and prescription chemotherapy drugs and provided no benefits or coverage for other out-of-hospital prescription drugs.

3. "Class" shall mean the Class certified by the Barbour County Circuit Court on March 10, 1993 as set forth in recital 11 below and as more fully defined in Section I below.

4. "Named Insured" or "policyholder" shall mean the person listed as "insured" on the face of the policy, and to whom benefits under the policy for the treatment of persons covered under the policy are payable by the terms of the policy.

5. "Covered Persons" shall mean dependents of Named Insured who are covered persons within the meaning of the applicable policy.

6. "Other out-of-hospital prescription drugs" or "other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer" shall mean all prescription drugs, other than prescription chemotherapy drugs, prescribed for any named insured or covered person with a diagnosis of cancer for use outside of a hospital in the (i) treatment of cancer, or (ii) treatment of the effects of cancer or of cancer treatment.

### RECITALS

1. Liberty National is an insurance company which offers, in addition to other insurance products, policies of insurance providing benefits to policyholders and insureds who are diagnosed with cancer.

2. Liberty National had in force, prior to August 29, 1986, certain old cancer policies which, among other benefits, provided benefits payable without monetary limits



to named insureds for themselves and other covered persons under the policy for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs.

3. It is alleged in this action that beginning on or about August 29, 1986, and on other occasions thereafter, Liberty National instituted a program or programs to offer those customers having the old cancer policies the opportunity to replace their old cancer policies then in effect with one of several new cancer policies which contained monetary limits for otherwise covered radiation, chemotherapy and prescription chemotherapy drugs, and eliminated the benefit for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer (the "alleged cancer policy exchange programs").

4. The new policies also provided certain new or enhanced benefits not provided by the old policy including, but not limited to, the following new benefits under one or more of the "new policy" forms: a "first occurrence" cash benefit payable to the named insured for each insured upon initial diagnosis of cancer; dread disease benefits; hospice benefits; benefits for prostheses; experimental treatment benefits; disability income benefits; and other new or enhanced benefits.

5. As of August 29, 1986, Liberty National discontinued the sale of old policies. Old policies issued prior to that date remained in force for those who already had such policies, but chose not to replace the old policy with the new policy, and continued to pay premiums on the old policy as and when due.

6. Under all old policies and new policies, all benefits payable for the treatment rendered to the named insured or any covered person are payable to the named insured under the policy, or to his assignee.

7. Charlie Frank Robertson ("Robertson"), prior to August 29, 1986, had purchased from Liberty National one of the old cancer policies described in recital 2 above, and was the named insured under said policy. After August 29, 1986, Robertson terminated his old policy and purchased one of the new policies to replace his old policy. Robertson was also the named insured under the new policy. Robertson has not been diagnosed with cancer and has made no claim for benefits under the new policy.

8. Robertson, on behalf of himself and the Class, contends that in the course of implementing the alleged cancer policy exchange programs, Liberty National misrepresented or failed to disclose material facts and, in particular, misrepresented the benefits afforded by the new policy and specifically failed to disclose the monetary limits imposed by the new policy upon benefits for radiation, chemotherapy and prescription chemotherapy drugs and the elimination of coverage for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer, and failed to adequately inform policyholders that such coverages were provided without such monetary limits or exclusions (under their old policies).

9. Liberty National vigorously denies the allegations and contends that the new policies provided substantially greater overall coverage than the old policies



and that the new policies have paid substantially greater sums in overall benefits to a large majority of those who later were diagnosed with cancer.

10. Robertson filed suit on or about May 12, 1992, against Liberty National initially asserting claims arising from a life insurance policy issued by Liberty National. All claims arising out of or related to the life insurance policy have heretofore been settled in a separate agreement between Robertson and Liberty National which has no bearing on this settlement agreement.

11. On or about October 2, 1992, Robertson (the "Named Plaintiff" and the "Class Representative"), amended his complaint (against Liberty National) to assert on behalf of himself and a purported Class claims arising out of the alleged cancer policy exchange programs.

12. On March 10, 1993, over Liberty National's objection, the Circuit Court of Barbour County (the "Circuit Court" or the "Court") entered a class action certification order pursuant to Rule 23(b)(2), Alabama Rules of Civil Procedure, certifying a class consisting of:

"All past and present insureds under cancer policies issued by Liberty National Life Insurance Company ("Liberty National") providing unlimited coverage for radiation, chemotherapy and out-of-hospital prescription drugs ("old policy"), which coverage was effective on or after August 29, 1986, the date that Liberty National offered new replacement cancer policies limiting coverage for radiation, chemotherapy and out-of-hospital prescription drugs ("new policy"), excluding from the certified

class any insured, who, on or before the date of this class certification order, has filed a separate action against Liberty National asserting claims arising out of the cancer policies o[r] [sic] coverage."

In its Order of March 10, 1993, the Circuit Court reserved the right to modify, clarify, amend or refine the class certification and the definition of the Class.

13. The parties to this Class Action and Litigation thereafter negotiated and now desire to enter into this Agreement to resolve all claims arising out of or related to the alleged cancer policy exchange programs or related to the Released Claims (as defined in Section III below) which have been asserted or could be asserted by or on behalf of the Class or any Class Members on the terms and conditions set forth in this Agreement. The intent and purpose of this Agreement is to effect a fair and reasonable full and final settlement of all actions, claims, demands, causes of action, and liabilities which may have heretofore been, or may hereafter be, asserted by or on behalf of any person or persons described in said Class arising from or related to the alleged cancer policy exchange programs or to the Released Claims as defined in Section III below.

14. After substantial discovery and after due inquiry deemed by them to be sufficient, counsel for Named Plaintiff and the Class have concluded that a settlement of this Litigation upon the terms and conditions hereof would be in the best interest of the Class considering the totality of the circumstances, including but not limited to the substantial benefits afforded by the settlement to all Class Members; the risks, uncertainty and expense of litigation; the substantial defenses which

have been and could be asserted by defendant Liberty National, including but not limited to statutes of limitation defenses (the applicability and merit of such defenses not being conceded by Named Plaintiff, Class Representative, or Class Counsel); the primary need for reformation of the new policies and for other equitable relief for the Class in order to ensure that all Class Members with new policies currently in force and all Class Members who lapsed their old policies after August 29, 1986, (and did not reinstate the old policy) are given the opportunity to maintain coverage against future cancer claims for radiation, chemotherapy, prescription chemotherapy drugs, and for other out-of-hospital prescription drugs all without monetary limits, while at the same time achieving restitution of any past benefits which Class Members may have enjoyed but for the matters alleged in the complaint; and the other substantial benefits available under the settlement.

15. Liberty National denies all liability with respect to any and all claims alleged in the Litigation or described in this Stipulation, but has entered into this Stipulation so as to: (1) avoid the substantial expense, inconvenience, distraction, uncertainty, and adverse publicity associated with continued litigation; (2) avoid the risks of the Litigation; (3) provide coverage without monetary limits for radiation, chemotherapy, prescription chemotherapy drugs and other out-of-hospital prescription drugs to Class Members under the new cancer policies and thereby preserve the goodwill and loyalty of Liberty National's customers; (4) avoid the burdens of multiple and piecemeal litigation of substantially similar allegations in separate lawsuits in different courts; and (5)

eliminate any possibility that any of its Class Members were or could be prejudiced by virtue of having replaced an old policy with a new policy.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and conditions herein, and the mutual undertakings of the parties hereto, it is hereby stipulated and agreed, by and among the Named Plaintiff, Class Representative, and Class Counsel on behalf of the Class, and the Defendant Liberty National and its Counsel, that the Litigation should be settled and compromised, subject to approval of the Circuit Court of Barbour County, Alabama, pursuant to Rule 23 of the Alabama Rules of Civil Procedure, according to the following terms and conditions:

## THE TERMS OF THE SETTLEMENT

### I. CLASS ACTION FOR SETTLEMENT PURPOSES

The parties agree, solely for the purpose of settlement, that the Litigation shall continue to be maintained as a class action pursuant to Alabama Rule of Civil Procedure ("ARCP") 23(b)(2), but if the Settlement is not approved or otherwise is not consummated, then the Parties retain all rights to oppose continued class action treatment, or to seek decertification of the Class.

The parties stipulate, subject to Court approval, that the Class shall consist of: all persons who now or in the past were insured under any cancer policy which (1) was issued by Liberty National Life Insurance Company ("Liberty National") on or before August 29, 1986, and (2) which provided benefits for radiation, chemotherapy,



prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; *provided, however*, that (i) any insured who is or was a named plaintiff in any separate lawsuit which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the Class *unless* such lawsuit has been voluntarily dismissed without prejudice on or before the date this settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the Class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the Class.

## II. BENEFITS FROM AND CONDITIONS OF SETTLEMENT

1. *Settlement of Pending and Potential Actions.* All actions, claims, demands, causes of actions, and liabilities which are asserted or which could be asserted by or on behalf of any Class Member in this Litigation relating to the alleged cancer policy exchange programs or the

Released Claims (as defined in Section III below) shall be resolved on the terms and conditions hereinafter provided.

2. *Settlement recommended by Class Counsel.* Class Counsel cannot bind the Class Members to the terms of this settlement without court approval, but Class Counsel and each of them shall recommend the settlement for approval and enforcement by the Court and shall support the fairness, adequacy, and binding effect of the settlement as to each Class Member in the event of any appeal or other challenge thereto.

3. *Court Approval.* All the transactions and undertakings herein are subject to approval by the Court and entry of a final judgment in accordance with Rule 54(b) of the Alabama Rules of Civil Procedure substantially in the form of the proposed order attached as Exhibit D, which: (i) approves the final certification of the Class described in Section I above; (ii) enters a final injunction and other declaratory and equitable relief permanently enjoining and requiring Liberty National to perform its obligations (including reformation of the new policies, ancillary restitution and the ancillary monetary relief) set forth in this Settlement Agreement (the "Injunction"), and subject to said Injunction and the right to enforcement thereof pursuant to the continuing jurisdiction reserved by the Court, approves the release of and dismisses with prejudice all claims asserted or which could have been asserted in this Litigation by or on behalf of the Class Members or any of them relating to the alleged cancer policy exchange programs or to the Released Claims as defined in Section III below; (iii) bars and enjoins each and all Class Members from filing, pursuing, continuing,



or participating as a litigant in any separate individual lawsuit or separate class action relating to the alleged cancer exchange programs or the Released Claims (as defined in Section III below); (iv) ratifies the terms of the escrow agreement attached hereto as Exhibit E, (v) establishes an administrative procedure for consideration of claims to be submitted by Class Members pursuant to paragraph II-11 of this agreement and approves the proof of claim form attached hereto as Exhibit C; (vi) designates a bar date on or before which proofs of claims shall be submitted as designated in the administrative procedure; and (vii) reserves jurisdiction over all matters related to the administration, consummation, interpretation, and enforcement of the Stipulation and Settlement. This settlement is further conditioned on final affirmance and approval by each appellate court, in which any appeal or other decision for review is filed, of all aspects of this settlement and the circuit court's Final Judgment and other orders contemplated hereby, if any appeal is taken from any such orders or judgments.

4. *Cash Payments to Be Made in Escrow.* Subject to the provisions of paragraph II-3, all fixed dollar settlement funds and the maximum amount of attorneys' fees which may be awarded by the Court will be paid by Liberty National to an independent escrow agent approved by the Court and placed in escrow within three (3) working days after preliminary approval of this Settlement Agreement by the Circuit Court. All fixed dollar settlement funds shall bear simple interest at twelve percent (12%) per annum from the date of the circuit court's preliminary approval until the date the funds are paid into escrow by Liberty National. In the event (i) any aspect of

the settlement agreement is rejected by the Circuit Court or approval of the settlement agreement by the Circuit Court is reversed, vacated, or modified on appeal, or (ii) an order precluding, barring, and enjoining separate actions by Class Members relating to the alleged cancer policy exchange programs or any of the Released Claims (as defined in Section III below) is not entered by the Circuit Court, or, if entered, is reversed, modified, or vacated in any respect on appeal; or (iii) any order is entered by the Alabama Supreme Court in any action now pending in any forum to which Liberty National is a party which permits the maintenance of separate individual or class actions asserting any Released Claims (as defined in Section III below) despite this settlement, then the escrowed settlement funds, attorneys' fees, and all accrued interest shall be returned from the escrow account to Liberty National. In the event the principal amount of attorneys' fees provided for in paragraph II-19 is less than the amount escrowed, the excess shall be returned from the escrow account to Liberty National. If this Settlement Agreement is approved by the Circuit Court and a Final Order and Judgment barring separate individual or class claims is entered by said court, and if such approval, order and judgment are affirmed finally and in their entirety in the event of any appeal, the escrowed settlement funds and the escrowed attorneys' fees (or such portion of the attorneys' fees if less is approved by the Circuit Court and affirmed in the event of appeals), and all accrued interest or investment proceeds ("interest") will be paid as the Court may direct thereafter to the Class Members and Class Counsel, with interest to be paid to the parties to whom the settlement

funds and the attorneys' fees funds are disbursed, i.e. with interest on the escrowed settlement funds distributed to the Class Members receiving the principal amount of the settlement funds; and with interest on the funds escrowed for attorneys' fees to be apportioned and distributed on the basis of the principal amounts to be distributed to Class Counsel and/or returned, if any, to Liberty National, all as provided in the written Escrow Agreement attached as Exhibit E.

5. *Class Members Insured Under Old Policies Which Lapsed After August 29, 1986 May Reinstate Policies.* Pursuant to the Injunction to be entered by the Circuit Court against Liberty National, Class Members who were named insureds under an old cancer policy in effect as of August 29, 1986 which was originally issued by Liberty National and which provided for benefits without monetary limits for radiation, chemotherapy, prescription chemotherapy drugs and/or other out-of-hospital prescription drugs, and whose old policy lapsed after August 29, 1986 (but was not replaced within 30 days by a new policy), shall have the option to reinstate his/her old policy, on a prospective basis only, without regard to insurability, at the current 1993 premium rate based on such Class Member's age on the date the old policy was originally issued. Provided, however, if the old policy terminated solely because the Class Member attained the termination age under the old policy, then the Class Member is not eligible for a reinstated policy under this paragraph. Current 1993 premium rates will not be increased prior to January 1, 1995 (as provided in paragraph II-8). Premiums will be charged on a prospective basis only, and coverage will be on a prospective basis

only. This option may be exercised by delivering a written request for reinstatement to: Thomas E. Hamby, Vice President, Liberty National Life Insurance Company, P.O. Box 2612, Birmingham, Alabama 35202. This option will expire if not exercised on or before January 1, 1995. If the option is exercised, reinstatement shall be effective only upon final approval of the Settlement (and final binding affirmance in the event of an appeal) and upon receipt of the applicable premium. Liberty National shall be enjoined to reinstate the policy of any Class Member who requests and qualifies for reinstatement under this paragraph. Any such reinstatement shall result in the cancellation of any new policy of such Class Member purchased while the Class Member was in lapsed status as to the old policy, and its replacement by the reinstated old policy on the terms provided in this paragraph. No one shall be construed by this agreement to qualify to own two (2) policies concurrently. Upon the lapse for non-payment of premiums or cancellation by the Named Insured of any policy reinstated under this paragraph, Liberty National shall have no further obligation under this settlement as to the lapsed policy or persons insured thereunder.

6. *Class Members Insured Under New Policy to Receive Waiver of Limits on Benefits.* Pursuant to an Injunction to be entered against Liberty National, Class Members who contemporaneously switched from an old policy to the new policy (and Class Members who lapsed the old policy, but bought a new policy within thirty days of that lapse and those Class Members who originally contemporaneously switched from an old policy to a new policy but subsequently switched from one new policy to



another new policy) will receive reformation of their new policies (if such new policy is currently in force) so as to provide prospective coverage for the named insured and covered persons under the new policy without monetary limits (with an automatic waiver or removal of any and all "caps" or monetary limits) for otherwise covered radiation, chemotherapy, and prescription chemotherapy drugs, and receive prospective coverage without monetary limits (with an automatic waiver or removal of any exclusion) for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer. These prospective coverages shall apply to any claim for any expense incurred after the date of final approval (or final binding affirmance in the event of appeal) of this Agreement. All other provisions, terms, and conditions of the policy shall remain unchanged. (Benefit claims of Class Members under new policies accrued prior to the date of this agreement are addressed by the restitution fund provided in paragraph II-10 and the ancillary settlement funds created in paragraphs II-9 and II-12 of this Agreement.) Class Members currently owning new policies and who are eligible for reformation under this paragraph shall be charged no additional premium for this additional coverage or waiver, provided, however, that claims paid under this additional coverage or waiver may be considered as claims experience for the purpose of future premium adjustments, subject to the provisions of paragraph II-8 of this Agreement. With respect to Class Members with new policies currently in force and who are eligible for reformation under this paragraph, Liberty National shall be enjoined from applying or enforcing any exclusion of benefits for out-of-hospital prescription

drugs prescribed in connection with the treatment of cancer, and shall be enjoined from applying or enforcing any monetary limits or caps upon benefits for radiation, chemotherapy, or prescription chemotherapy drugs which is contained in any new policy currently owned by such Class Member; provided, however, that nothing herein shall prohibit Liberty National from continuing to enforce or apply such monetary limits or caps or exclusions with respect to policies owned by persons who are not Class Members or who are not eligible for reformation under this paragraph. The provisions of this paragraph II-6 shall apply only to new policies of said Class Members which are in force as of the date this Settlement Agreement is executed and shall apply to said policies only so long as they are kept in force and all premiums are paid (or after any reinstatement permitted under the terms of the policy upon full payment of all delinquent premiums). In the event of any appeal from a Final Order of the Circuit Court approving this Settlement, the Injunction contemplated by this paragraph shall take effect upon final binding affirmance of said appeal.

7. *Pooling of Class Members for Rate Making Purposes.* For purposes of future premium rate filings, Liberty National will "pool" the experience of all Class Members in all states in which these policies were approved for issuance unless specifically disapproved by the insurance department of one or more of the states. After preliminary approval of the Settlement, Liberty National will file all future premium rates based on the "pooled" claims and premiums experience of all Class Members in all states in which these old and new cancer policies were approved for issuance, and the Court will enter an Order



enjoining Liberty National to use its best efforts to obtain acceptance from all state insurance departments to allow Liberty National to "pool" the experience of all Class Members for rate making purposes. In the event the insurance department of one or more of the states disapproves "pooled" rate filing in that state, Liberty National will "pool" the experience of all Class Members in all remaining states. This settlement is not conditioned on approval of pooling of Class Members by any or all insurance departments in the states in which these policies were approved for issuance. This provision does not require Liberty National to pool policyholders or insureds who are not members of the Class with Class Members. The obligations of this paragraph shall expire if this Settlement is not approved by the Circuit Court or if such approval is reversed, vacated, or modified on appeal or other petition for review.

8. *Premiums Not Increased From Current Rates.* Pursuant to the Settlement, an Injunction will be entered against Liberty National prohibiting Liberty National from increasing premiums for any old policies of Class Members currently in force and for any new policies of Class Members currently in force prior to January 1, 1995. Thereafter, the percentage of any premium rate increase for old policies of Class Members shall not exceed the percentage of premium rate increases for new policies of Class Members. The requirements of this paragraph do not apply with respect to persons who are not Class Members.

9. *Incidental Monetary Settlement Fund for Class Members Who Submitted Certain Cancer Claims Under New Policies.* Pursuant to the Injunction to be entered against

Liberty National and ancillary to the equitable relief ordered by the Court, the trial court will order Liberty National to pay to the escrow agent the sum of one million dollars (\$1,000,000.00), subject to the terms and conditions of this settlement and the terms and conditions of the escrow agreement attached hereto as Exhibit E. All Class Members who return true and proper proof of claim forms (Exhibit C) as described in paragraphs II-10 and II-11 and who were named insureds on new policies pursuant to which benefit claims were submitted for radiation, chemotherapy or prescription chemotherapy drugs, or for whom expenses were incurred for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer administered to any covered person under the policy will share per capita in this fund. With respect to other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer, Class Members who submit a true and proper proof of claim form (Exhibit C), and who otherwise qualify under this paragraph, shall be entitled to share per capita in this fund if he/she incurred expenses for other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer to any covered person under the Class Member's new policy which was in effect at the time the expenses were incurred. Within ninety (90) days of the deadline for submission of proof of claim forms provided in paragraph II-11, or within thirty (30) days of final binding affirmance of approval of this Settlement in the event of an appeal, whichever last occurs, Liberty National shall file with the Clerk and the Special Master a list setting forth the names and last known addresses of each Class Member shown by Liberty National records to be qualified to share in this

fund. A check in the amount of each qualified Class Member's per capita share of this fund will be sent by the Escrow Agent (at Liberty National's expense) to the last known address of each such Class Member. Such check shall be mailed at the same time and in the same manner as set forth in paragraph II-11 below. Class members eligible hereunder for the benefits of this paragraph shall include and be limited to those class members described in this paragraph who contemporaneously switched from an old policy to a new policy (including class members who lapsed the old policy, but bought a new policy within 30 days of that lapse), and any such class members who originally contemporaneously switched from an old policy to a new policy but subsequently switched from one new policy to another new policy.

10. *Liberty National to Provide Full Restitution of Certain Benefits to Class Members Who Have Submitted Certain Benefit Claims Under the New Policy.* Pursuant to the Injunction to be entered against Liberty National, and ancillary to the equitable relief ordered by the Court, any Class Member who was a named insured under a new policy when a claim for cancer benefits under that new policy was heretofore submitted for radiation, chemotherapy, or prescription chemotherapy drugs which exceeded the monetary limits for these coverages under said new policy, or whose expenses included any other out-of-hospital prescription drugs prescribed in connection with the treatment of cancer shall have the right to submit a proof of claim on the form attached as Exhibit C, with supporting documentation. If, after considering all benefits paid to (or to the assignee of) each such Class Member under the new policy (including but not limited

to all benefits which would not have been afforded by the Class Member's old policy), the claimant Class Member has still received fewer dollars than he/she would have received for all benefits (including "hospital admission" benefits and all other benefits under the old policy) had the Class Member's old policy remained in force and all other benefits under the old policy, then Liberty National shall, pursuant to the Injunction contemplated hereby, make restitution of one hundred percent (100%) of the difference to the named insured under the new policy which was in force at the time of the pertinent treatment. To the extent each claiming Class Member qualifies for payment under this paragraph, he/she shall be paid the amount due hereunder without regard to any defense of the statute of limitations which could have been asserted by Liberty National had this case gone to trial. Only Class Members who were named insureds on the new policy which was in force at the time the treatment was rendered and who submit true and proper proof of claim forms with supporting documentation and who are otherwise eligible for payments under the terms of this paragraph ("Qualified Claims"), will be entitled to the benefits of this paragraph. Copies of legitimate bills or invoices from medical providers will be considered adequate documentation, subject to Liberty National's right to contest the accuracy or validity of the claim. Upon written request by or on behalf of a claimant, Liberty National will use reasonable good faith efforts to assist in locating and providing any information reasonably available within its files or data processing records concerning the identity of providers and dates of service for any such claimant. Nothing in this paragraph shall require Liberty



National to pay for any expense it has already actually paid, or to make duplicate payments for the same item of expense. Class Members eligible hereunder for the benefits of this paragraph shall include and be limited to those class members described in this paragraph who contemporaneously switched from an old policy to a new policy (including class members who lapsed the old policy, but bought a new policy within 30 days of that lapse), and any such class members who originally contemporaneously switched from an old policy to a new policy but subsequently switched from one new policy to another new policy.

11. *Administrative Procedure for Claims.* The Court shall appoint a Special Master to review all claims and disputes which may arise with respect to proofs of claim made pursuant to paragraph II-10. The Special Master shall have no authority to alter or modify the terms of this Agreement. The Special Master shall not be a past or present employee or expert of or for any of the parties hereto or their counsel. The proof of claim form referenced in paragraph II-10 is attached hereto as Exhibit C. The proof of claim form shall be mailed at the same time and to the same persons as provided with respect to the Notice described in paragraph II-17 below. The proof of claim form shall require all claims to be submitted to the Special Master within 120 days of mailing. Within seven (7) days of receipt of each proof of claim form, the Special Master shall (i) submit one copy of each proof of claim form received to counsel for Liberty National, (ii) submit one copy of each proof of claim form received to Class Counsel; and (iii) file the original proof of claim form with the Court. No later than ninety (90) days after said

deadline for submission of proof of claim forms by Class Members, or thirty (30) days after final binding affirmance of this Settlement in the event of appeal, whichever last occurs, Liberty National shall submit to the Special Master a list of all proofs of claim, together with a statement of the amount (if any) calculated by Liberty National to be due each claimant as restitution under this paragraph. Within thirty (30) days following the expiration of the time for appeal, or following final binding affirmance of the Circuit Court, each claimant Class Member will then be notified in writing by the Special Master (at Liberty National's expense) of the preliminary disposition of his claim by Liberty National and will be notified that the Class Member can then obtain a special hearing of his claim by the Special Master by requesting such a hearing in writing addressed to Class Counsel, and that such request must be submitted within thirty (30) days. Class Members submitting a timely written request for hearing shall be notified in writing of the hearing date and the place of hearing set by the Special Master. Following said hearing, the Special Master shall make a final determination as to the claimant's entitlement under paragraph II-10, which determination shall be binding on the claimant and all other parties unless contested by either party, in which event the Special Master shall file his determination as his findings and recommendations to the Court for the final binding determination. Liberty National will be required to make restitution to each Qualified Claimant on the terms specified in paragraph II-10 within sixty (60) days after the final determination as to all proofs of claim, and the restitution required by this paragraph II-11 as determined by the



Special Master (or if disputed, by the Court) will be paid by a check payable to each pertinent named insured at the address shown in the named insured's proof of claim form. The proof of claim form and notice shall clearly notify Class Members that they must submit proof of claim forms within 120 days of mailing of the notice contemplated by paragraph II-17 below, regardless of any appeal of or objection to this Settlement, but that the filing of a proof of claim form shall not waive or otherwise preclude the Class Member's right to object to or appeal any approval of this Settlement by the Court, and that if the Court (or any appellate court) rejects any aspect of the Settlement, or if any other condition of this Settlement is not met, then the Class Member's submission of the proof of claim form shall not prejudice his right in any subsequent litigation.

12. *Supplemental Extracontractual Monetary Relief Fund for Certain Class Members.* Pursuant to the Injunction to be entered against Liberty National and ancillary to the equitable relief provided, the Court will order Liberty National to pay to the escrow agent the sum of three million dollars (\$3,000,000.00), subject to the terms and conditions of this settlement and the terms and conditions of the escrow agreement attached hereto as Exhibit E. Each Class Member who is a named insured under a new policy and who submits a valid and proper claim form which is determined (pursuant to the procedures of paragraph II-11) to demonstrate his/her entitlement to receive payment of restitution under the terms of paragraph II-10 ("Qualified Claimant") will, in addition to any other payment, share in this fund consisting of three million dollars (\$3,000,000.00) to be paid by Liberty

National to the escrow agent as provided in paragraph II-4. This fund will be divided among Qualified Claimants in an equitable method to be devised by the Court. The Court shall devise the most equitable methodology for distribution of this Supplemental Extracontractual Monetary Relief Fund to all Qualified Claimants (i) per capita; or (ii) based on the amount by which each Qualified Claimant's total benefits which would have been received under the old policy exceeded the total benefits actually paid by Liberty National under the Class Member's new policy; or (iii) a combination of (i) and (ii) after determination of the number of Qualified Claimants and the amount of qualified claims. This fund shall be paid to each Qualified Claimant at the same time and in the same manner as provided in paragraph II-11 and shall be considered as ancillary to the restitution and other equitable relief afforded by the Settlement. Class members eligible hereunder for the benefits of this paragraph shall include and be limited to those class members described in this paragraph who contemporaneously switched from an old policy to a new policy (including class members who lapsed the old policy, but bought a new policy within 30 days of that lapse), and any such class members who originally contemporaneously switched from an old policy to a new policy but subsequently switched from one new policy to another new policy.

13. *Deceased Class Members.* The estate of a deceased named insured Class Member who otherwise qualifies will be entitled to any benefits for otherwise valid claims as provided by paragraph II-10, but will not share in benefits provided by paragraphs II-9 or II-12. The executor or administrator of the estate of any such deceased

person shall be entitled to file the proof of claim form on behalf of the deceased and his/her estate, but shall be required to attach thereto a copy of documents sufficient to show that he/she is or was the executor or administrator of the deceased's estate. This requirement shall be clearly noted on the claim form.

14. *Settlement Requires Rule 23(b)(2) Mandatory Class With No Right of Opt Out.* This Settlement Agreement is conditioned on approval by the Court of a Rule 23(b)(2) mandatory class with no right to opt out, and a final court order (and final binding affirmance in the event of any appeal) expressly barring, enjoining, and precluding each Class Member from filing, prosecuting or participating as a litigant (by intervention or otherwise) in any separate individual or class suits regarding the alleged cancer policy exchange programs or asserting any claims which are to be "Released Claims" as defined in Section III below. Provided, however, that this prohibition shall not apply to restrict Named Plaintiff and Class Counsel from fulfilling their obligations under Section VI below. This Settlement Agreement is further conditioned on there being no decision by the Alabama Supreme Court inconsistent with this paragraph in any lawsuit involving the alleged cancer policy exchange programs to which Liberty National is a party prior to the entry (and final binding affirmance in the event of appeal) of the Final Judgment, approval and orders of the Circuit Court of Barbour County contemplated herein.

15. *No Admission of Liability By Liberty National.* Liberty National, by agreeing to the terms of this settlement, does not admit, but to the contrary denies, any liability or wrong-doing in any form or fashion by Liberty National,

but has entered into this Settlement Agreement to avoid the expense, adverse publicity, and uncertainty of litigation, and for other reasons set forth above. Liberty National strongly contends that its new policies provide substantially greater overall benefits or coverage to most, if not all, insureds, and result in the payment of greater total benefits to a majority of insureds who are later diagnosed with cancer. Liberty National denies that any Class Member or any other person would have any right to or grounds for obtaining the relief described herein, but is willing to agree to the terms of this settlement so that no Class Member can even arguably have been prejudiced by any aspect of Liberty National's decision to offer to replace its old cancer policies with a more modern policy.

16. *Court Submittals.* Counsel for the parties shall jointly submit to the Court and shall advise the Court that they jointly request court approval and entry of the following: (i) a proposed order preliminarily approving this Settlement Agreement and ordering notice to Class Members (attached hereto as Exhibit A); (ii) proposed notice to Class Members (attached hereto as Exhibit B) to be mailed by Liberty National and summary notice (attached hereto as Exhibit B-1) to be published by Liberty National as provided in Exhibit A, which advises them of the terms of this Settlement Agreement and of each Class Member's right to be heard concerning the fairness, reasonableness and adequacy of the settlement at a hearing before the Court; and (iii) proposed proof of claim form (attached hereto as Exhibit C) to be completed by the named insured Class Members specified in paragraph II-10 and designed to furnish information sufficient



to enable Liberty National, the Special Master and the Court to calculate the amounts to which said named insured Class Members will be entitled under the terms of this Settlement Agreement if it is approved and if the conditions of this Settlement are satisfied; (iv) a proposed order and final judgment (attached hereto as Exhibit D) which provides, inter alia, that the settlement is finally approved, and that all Claims asserted or which could have been asserted by Class Members regarding the alleged cancer policy exchange programs or the Released Claims (as defined in Section III below) are finally released and dismissed with prejudice (subject only to the enforcement of the terms of this settlement), and which bars and enjoins Class Members from filing, pursuing, or participating as litigants (by intervention or otherwise) in any separate individual or class actions asserting any of the Released Claims; and (v) a proposed escrow agreement (attached hereto as Exhibit E) to be executed by the escrow agent appointed by the Court and providing the duties of the escrow agent, and direction to the escrow agent as to the appropriate investments for the settlement fund, and the terms for release of the funds from escrow.

17. *Notice to Class Members.* As soon as practicable after preliminary approval by the Circuit Court, Liberty National shall, at its expense, mail a class action notice as required by Exhibit A, in a form approved by the Court and agreed to by Named Plaintiff, Class Counsel, and Liberty National, to the last known address of each Class Member specified in Exhibit A, which notice shall be mailed at least sixty (60) days in advance of the hearing date. Any Class Member who demonstrates that he failed to receive the class notice and who otherwise qualifies for

restitution under paragraph II-10 can nonetheless avail himself of the benefits provided by paragraph II-10 within a reasonable time after receiving actual notice, and if his claim is filed before the funds provided in paragraphs II-9 and II-12 have been paid by the escrow agent, the claimant will share in those funds as well to the extent he/she qualifies.

18. *Payment of Court Costs.* Liberty National shall pay all court costs taxed by the Court which shall consist of all expenses for class notice, fees and expenses of actuarial or other experts employed by Class Counsel, and fees and expenses of the Special Master as approved by the Court. Fees for the actuarial or other experts employed by Class Counsel shall not exceed the total sum of \$150,000.00, collectively. The hourly rate of the Special Master shall not exceed \$150.00 per hour.

19. *Fees and Expenses for Class Counsel.* Class counsel will petition the Court for an award of reasonable attorneys' fees and expenses which shall be paid by Liberty National in addition to all other costs and expenses provided for in Paragraph II-18 above in this Agreement. Illegible attorneys' fees and expenses shall be in addition to and shall not be deducted from amounts to be disbursed to Class Members under the Settlement. The amount of attorneys' fees and expenses to be awarded to Class Counsel shall be determined by the Court, but in no event will the attorneys' fees exceed the total sum (for all Class Counsel, collectively) of 4.5 million dollars (\$4,500,000.00) for all attorneys' services relating to this Litigation, including but not limited to, services rendered and to be rendered in connection with the Settlement or



its implementation. Liberty National will not object to any request for attorneys' fees in an amount not in excess of that amount. The expenses to which the Class Counsel shall be entitled will be restricted to actual and necessary out-of-pocket expenses as allowed by the Court not to exceed \$35,000.00. These expenses shall be in addition to those specific expenses referred to in paragraph II-18.

20. *Resolution of Objections.* Any objections of Class Members to the certification of this action pursuant to ARCP 23(b)(2), to the fairness or adequacy of the settlement or class notice, to approval of the settlement by the Circuit Court, and any objections or disputes related to the allowance or disallowance of claims of Class Members, or the implementation or enforcement of this Settlement or the binding effect of this Settlement upon the claims of any Class Member, or relating to the award of attorneys' fees and expenses to Class Counsel within the limits imposed in paragraph II-19, or relating to any aspect of this Settlement shall be submitted to the Circuit Court of Barbour County for decision.

21. *Final Judgment.* This Settlement Agreement is subject to the Court entering a final judgment containing injunctive, declaratory and equitable relief (including reformation of policies, ancillary restitution and other ancillary monetary relief) necessary to implement this Agreement in substantially the form as set out in Exhibit D attached hereto. It is the intent of the parties that said Final Judgment shall be entered upon final Court approval of this Settlement Agreement. Subject to the terms and conditions of the Stipulation, Liberty National, its successors and/or assigns, and all persons or entities acting in concert with Liberty National, shall be enjoined:

(i) from instituting, engaging or participating in, authorizing, maintaining, or continuing any of the alleged cancer policy exchange programs, (ii) from instituting, engaging or participating in, maintaining or authorizing any future program relating to the exchange, substitution, switching or attempting to exchange, substitute, or switch Liberty National cancer insurance policies whereby the substituted policy excludes or limits any benefits that are provided in the replaced Liberty National cancer policy, without full disclosure of the benefits and coverages in the original and substituted policies, including disclosure of any benefits in the original policy which [sic] are excluded or limited benefits in the substituted policies; (iii) with respect to those Class Members specified in paragraph II-6, above, to reform the new policies of such Class Members currently in force to provide (subject to the terms and conditions of the Stipulation) prospective coverage without monetary limits for radiation, chemotherapy, prescription chemotherapy drugs administered to the named insured or any covered person under the new policy; and to provide prospective coverage without monetary limits or for other out-of-hospital prescription drugs prescribed to the named insured or any covered person under the new policy in connection with the treatment of cancer, so long as the current new policy remains in force and premiums are paid; (iv) from increasing the premiums on the old or new policies of Class Members prior to January 1, 1995; (v) to make restitution to the named insured Class Members for otherwise valid benefit claims heretofore accrued under the new policies of Class Members to the extent required by and in accordance

with the terms and conditions of paragraphs II-10 and II-11 of the Settlement; (vi) from denying any otherwise valid future claims under the new policies of those Class Members specified in paragraph II-6 above for benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs hereinafter administered to any covered person under the new policy in connection with cancer on the basis of any monetary limits upon or exclusions of coverage for said benefits under the new policies of such Class Members, subject to the terms and conditions of the Settlement; and (vii) to pay the two settlement funds and attorneys' fees into escrow and to pay other fees and expenses as set out in the Settlement Agreement and to implement all other terms of this Settlement. Each Class Member shall be enjoined from bringing any subsequent action asserting the Released Claims (as defined in Section III below).

22. *Dismissal of Pending Claims.* Subject only to final approval (and final binding affirmance in the event of appeal) of this Settlement Agreement upon the terms and conditions specified in this document and to the entry of the final judgment provided for in paragraph II-21 of this Settlement Agreement, all claims whatsoever which were or could have been asserted by the Named Plaintiff or by or on behalf of any Class Member (including, but not limited to, all claims which could have been asserted by intervention or otherwise) against Liberty National (or any of the related persons or entities to be released pursuant to Section III below) regarding the alleged cancer policy exchange programs or the Released Claims (as defined in Section III below) shall be dismissed with

prejudice. Upon entry (and final binding affirmance in the event of appeal) of the final judgment provided for in paragraph II-21 of this Settlement Agreement, and without further action by anyone, each and all of the Class Members shall be deemed to have released Liberty National as set forth in Section III below.

23. *Termination of Agreement.* If this Settlement is not approved in its entirety by the Court by a final judgment which conforms to the provisions of this Settlement Agreement entered in accordance with Rule 54(b), or if any other condition of this Settlement Agreement is not met, then in that event: (i) the funds deposited with the escrow agent shall be returned to Liberty National together with all accrued interest; (ii) the parties and Class Members shall be restored to the status quo which existed prior to the execution of this Agreement; and (iii) the obligations of the parties to implement the settlement, other than the obligation of Liberty National to pay the fees and expenses of the actuarial expert employed by Class Counsel, any expense theretofore incurred by the Special Master and any expenses in connection with the Class notice, shall be null and void. Provided, however, that parties may, by written mutual agreement, executed in accordance with paragraph VII-5 below, waive any condition which they mutually agree is not material.

24. Nothing in this document or the orders contemplated hereby shall require Liberty National to take, or prohibit Liberty National from taking, any action with respect to persons who are not Class Members.



### III. Released Claims

Effective upon on [sic] the final approval of all aspects of this Settlement by the Circuit Court of Barbour County, Alabama, and the final, binding affirmance of said approval in the event of any appeal, Named Plaintiff, individually and on behalf of the Class, and each Class Member, separately and severally, do hereby full [sic], finally, and forever release Liberty National and each of its past, present, and/or future: parents, subsidiaries, affiliated and related entities and persons, officers, employees, directors, shareholders, agents, successors, and assigns, separately and severally, of and from all claims, causes of action and liabilities (known or unknown) which have been or could be asserted by any Class Member, whether arising under state or federal statutory or common law, to the extent such claims, causes of action or liabilities arise from, are connected with, or are in any way based upon or related to any allegation of fraud, misrepresentation, concealment, failure to disclose, or other tortious conduct or breach of duty which occurred in whole or in part on or before the date of this Settlement Agreement, regarding (1) the alleged cancer policy exchange programs, (2) any other transaction resulting in the issuance of a new policy providing cancer coverage for a Class Member previously insured under an old policy, or (3) the failure to offer or issue any Class Member a new policy (the "Released Claims").

### IV. Procedures to Obtain Court Approval

The parties agree, as soon as practicable after execution of this Settlement, to take all necessary steps to obtain Court approval of the Settlement, as follows:

(a) the parties shall apply jointly for entry of an Order With Respect to Proposed Settlement (the "Preliminary Order") substantially in the form attached hereto as Exhibit A (i) providing that, for the purposes of settlement only, the Litigation shall proceed as a class action pursuant to ARCP 23(b)(2); (ii) directing that notice of the proposed Settlement be provided by Liberty National to all Class Members specified in Exhibit A who can reasonably be identified by individual notice delivered by first class mail to the last known address of each Class Member, substantially in the form attached hereto as Exhibit B, and by one-time publication of a summary notice, substantially in the form attached hereto as Exhibit B-1, in the newspapers listed in the Preliminary Order; (iii) setting a hearing date for a fairness hearing pursuant to ARCP 23; and (iv) providing that any Class Member who objects to this Stipulation or to any part thereof, or to the fairness, adequacy or reasonableness of the Settlement, or to the procedures provided for herein, or to the maintenance of the Litigation under ARCP 23(b)(2), or to the contents and method of delivery of the notice, or to any Order or findings entered by the Court, may appear at the Settlement Hearing to show cause why the Settlement should not be approved, provided that such Class Member files at least ten (10) days prior to the date of the Settlement Hearing his or her written objections (and any briefs or supporting papers) with the Clerk of



the Court and serves copies thereof upon counsel designated in the Preliminary Order to receive the same.

(b) following the fairness hearing, the parties shall jointly file a Motion for an Order and Final Judgment in substantially the form attached hereto as Exhibit D, approving the Settlement, and dismissing with prejudice all Released Claims (as defined in Section III above) which have been or could have been asserted by Named Plaintiff and all Class Members against Liberty National. It is contemplated by the parties that the Court shall, in accordance with applicable law, enter appropriate Findings of Fact and Conclusions of Law regarding the approval or disapproval of this settlement, disposition of any objections which may be raised at or in conjunction with the fairness hearing.

#### V. Costs of the Notice

Liberty National agrees to pay the costs of preparation of the agreed-upon notice to Class Members of the proposed Settlement if said notice is approved by the Court, as well as the costs of delivery, mailing and publication of the Notice.

#### VI. Other Actions

If any Released Claims (as defined in Section III above) are brought by any person in any court prior to the entry (and final binding affirmance in the event of any appeal) of a final judgment in the Litigation pursuant to the terms contemplated herein, all parties and Class Counsel shall cooperate to have the action (or actions)

transferred to the Circuit Court of Barbour County, Alabama in which the Litigation is pending and to seek dismissal of the action (or actions) or to have such action or actions consolidated with this Litigation and subject to resolution pursuant to this Settlement. This paragraph shall be binding upon all parties and Class Counsel immediately upon final approval of this Settlement by the Circuit Court and shall continue to be effective unless and until said approval of the Settlement is reversed or vacated on appeal.

#### VII. Miscellaneous

1. *Additional Documentation.* The parties agree to execute such additional documents as may be reasonably necessary to effectuate the settlement.

2. *Authority to Execute.* The undersigned person executing this agreement on behalf of Liberty National represents and warrants to the Plaintiff, Class Members and the Court that he is authorized to execute this agreement and to fully bind Liberty National to its terms.

3. *Counterparts.* This agreement may be simultaneously executed in several counterparts, each of which shall be deemed an original and all of which shall constitute but one and the same instrument. This agreement may also be executed in duplicate originals each of which shall be deemed an original for all purposes.

4. *Entire Agreement.* This document and the exhibits referenced herein constitute the entire agreement between the parties with regard to the subject matter hereof and all negotiations, oral or otherwise, prior to the

execution of this Settlement Agreement are merged herein. The terms of this agreement may not be modified, varied or amended except in writing signed by all parties hereto and approved by the court.

5. *Parties Bound.* This agreement shall be binding upon and inure to the benefit of the parties hereto including all Class Members and their respective heirs, predecessors, privies, administrators, executors, representatives, guardians, successors and assigns.

6. *Continuing Jurisdiction.* All proceedings with respect to the Settlement and the determination of all controversies relating thereto, including but not limited to enforcement of the judgment and of the terms of the Settlement and resolution of any disputed questions of law and fact with respect to the release of the Released Claims, shall be subject to the continuing jurisdiction of the Circuit Court of Barbour County, Alabama.

7. *Counsels Authority to Execute.* Each of the attorneys executing this Settlement on behalf of Liberty National or Robertson, as Named Plaintiff and as Class Representative, warrants and represents that he or she has been duly authorized and empowered to execute this Stipulation on behalf of such party.

8. Nothing in this document or the judgments or orders contemplated hereby shall require Liberty National to provide insurance coverage for the treatment of a disease or condition which is not otherwise covered by the pertinent policy, or for drugs or treatments which have not been approved for use in this country as described in the policies nor shall anything in this Agreement require Liberty National to allow the same insured

to be covered under more than one (1) Liberty National cancer policy at the same time. No act of Liberty National in implementing any provisions of the Settlement at or before the time required hereunder shall estop or otherwise preclude Liberty National, in any respect, from withdrawing any benefits or coverage contemplated hereunder in the event this Settlement is rejected by the Court or reversed, vacated, or modified on appeal.

IN WITNESS WHEREOF, and intending to be legally bound thereby, this Settlement has been executed this 16th day of June, 1993 by the undersigned counsel on behalf of their respective clients, and by the Named Plaintiff and Liberty National.

OF COUNSEL:

BEASLEY, WILSON, ALLEN,  
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/s/ Jere L. Beasley  
JERE L. BEASLEY  
One of the Attorneys  
for Named Plaintiff  
and Class

OF COUNSEL:

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/s/ Walter R. Byars  
WALTER R. BYARS  
One of the Attorneys  
for the Class

OF COUNSEL:

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/s/ James W. Gewin  
JAMES W. GEWIN  
One of the Attorneys  
for Liberty National

LIBERTY NATIONAL LIFE  
INSURANCE COMPANY

BY: /s/ William C. Barclift  
ITS GENERAL  
COUNSEL

/s/ Charlie Frank  
Robertson  
CHARLIE FRANK  
ROBERTSON,  
Individually and  
as court-approved  
representative of the  
Class

[PROPOSED - NOT  
YET ENTERED BY  
CIRCUIT COURT]

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON,	)	
for himself, and in his	)	
representative capacity for the	)	
class of persons described herein,	)	Case Number:
Plaintiff,	)	CV-92-021
	)	
vs.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant.	)	

ORDER AND FINAL JUDGMENT

A Settlement Hearing having been held before this Court on \_\_\_, 1993, pursuant to this Court's order of June 16, 1993, to determine whether this Court should approve as fair, adequate and reasonable a settlement of this action upon the terms and conditions of the attached Stipulation and Agreement of Compromise and Settlement dated June 16, 1993 and executed by all parties ("Stipulation" or "Stipulation of Settlement"); it appearing that due notice of said Settlement Hearing was given in accordance with the terms of the aforesaid order; the Court having determined that notice to the Class, as described in the aforesaid order, was the best practicable notice under the circumstances, and fully complies with



all requirements of Due Process, and all requirements of Alabama Rule of Civil Procedure 23; the respective parties having appeared by their attorneys of record; the Court having received and considered arguments and evidence in connection with the proposed compromise and settlement of the action; the attorneys for the respective parties having been heard; and opportunity to be heard having been given to all of the person requesting to be heard in accordance with the aforesaid order; and the proposed Settlement and all other matters of record in this action having been heard and considered by the Court; and based on the Findings of Fact and Conclusions of Law set forth in a separate order entered contemporaneously herewith, it is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. For purposes of considering, approving and effectuating the Stipulation of Settlement and to fairly and adequately protect the interests of the members of the class, this Court has previously ordered, and hereby orders and confirms, that this action is to be maintained as a class action pursuant to Ala.R.Civ.P. 23(b)(2), for a Plaintiff Class consisting of:

All persons who now or in the past were insured under any cancer policy which (1) was issued by Liberty National Life Insurance Company ("Liberty National") on or before August 29, 1986, and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed

or was replaced by a different Liberty National cancer policy after that date: *provided, however*, that (i) any insured who is or was a named plaintiff in any separate lawsuit which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the Class *unless* such lawsuit has been voluntarily dismissed without prejudice on or before the date this Settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the Class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the Class.

2. The Court has heretofore found and hereby finds and reaffirms for purposes of settlement that the Named Plaintiff is an adequate representative of the Class and that all requirements of Ala.R.Civ.P.23(b)(2) are met. The Court expressly finds for purposes of settlement that the Class is so numerous that joinder of all members is impracticable; that there are questions of law and fact, common to the Class; that the claims of the Named Plaintiff are typical of the claims of the Class; that the representative parties have fairly and adequately protected the interests of the Class and will continue to do so; that, assuming the allegations of the complaint (which Liberty National denies) to be true, Liberty National has acted on grounds generally applicable to the class, thereby making

appropriate final equitable and injunctive relief with respect to the class as a whole; that the nature of the interests of the class members, the nature of the Settlement, and the fact that the vast majority of class members have not suffered any actual out-of-pocket monetary losses or damages at this time, make this action inappropriate for certification under Ala.R.Civ.P.23(b)(3); and that maintenance of this action pursuant to Ala.R.Civ.P.23(b)(2) is superior to any other method of proceeding with these claims.

3. Liberty National Life Insurance Company is hereby enjoined and ordered to perform its obligations under the Stipulation of Settlement, which Stipulation of Settlement is hereby affirmed and approved in its entirety and incorporated herein by reference. The Court expressly finds that the primary relief provided for by the Stipulation and Settlement and the primary relief which would be justified by the alleged (but denied) conduct, is injunctive and further equitable relief in the nature of declaratory relief, reformation of certain insurance policies, and ancillary restitution. The provisions in the Stipulation of Settlement for incidental monetary relief and supplemental extracontractual monetary relief are ancillary to the primary equitable and injunctive relief.

4. Subject to the terms and conditions of the Stipulation of Settlement, Liberty National Life Insurance Company and its successors and assigns, and all other entities and individuals acting in concert with Liberty, National are hereby permanently ENJOINED:

(a) From instituting, engaging or participating in, maintaining, authorizing or continuing any of the alleged cancer policy exchange

programs as defined in the Settlement and Stipulation;

(b) From instituting, engaging or participating in, maintaining or authorizing any future program relating to the exchange, substitution, switching or attempting to exchange, substitute, or switch Liberty National Cancer insurance policies whereby the substituted Liberty National Cancer policy excludes or limits any benefits that are provided in the replaced Liberty National Cancer policy, without full disclosure of the benefits and coverages in the replaced and substituted policies, including disclosure of any benefits in the original policy which are excluded or limited benefits in the substituted policies;

(c) With respect to those Class Members specified in paragraph II-6 of the Stipulation, to provide benefits without monetary limits for radiation, chemotherapy, prescription chemotherapy drugs, and out-of-hospital prescription drugs prescribed in connection with the treatment of cancer under the new policies of such Class Members currently in force so long as the new policies remain in force and premiums are paid;

(d) With respect to those Class Members specified in paragraph II-6 of the Stipulation, to reform (or treat as having been reformed) the new policies (as defined in the Stipulation) of Class Members presently in force to provide prospective coverage without monetary limits (so long as each such new policy is kept in force and all premiums are paid) for otherwise covered radiation, chemotherapy, and prescription chemotherapy drugs administered to the named



insured or any covered person under the new policy in connection with the treatment of cancer, and to provide coverage without monetary limits for other out-of-hospital prescription drugs prescribed to the named insured or any covered person under the new policy in connection with the treatment of cancer, subsequent to the later of (i) the date of this order or (ii) the final binding affirmance of this order in the event of any appeal or other petition for review, if any appeal or petition for review is taken regarding this action. No additional premium shall be charged for this additional coverage; provided, however, that claims paid under this additional coverage or waiver may be considered as claims experience for the purposes of future premium adjustments, subject to the provisions of paragraph II-8 of the Stipulation.

(e) From increasing the premiums on the old cancer policies or the new cancer policies of Class Members prior to January 1, 1995;

(f) With respect to those Class Members specified in paragraph II-10 of the Stipulation, to make restitution to the named insured for otherwise valid benefit claims heretofore accrued under the new policies of Class Members for radiation, chemotherapy, prescription chemotherapy drugs and other out-of-hospital prescription drugs administered to any covered person under the Class Member's new policy in connection with the treatment of cancer, without regard to any monetary limits upon or exclusion of these benefits which were previously applicable under Class Members' new policies, subject to the terms, conditions and limitations of the

Stipulation and particularly those set forth in paragraphs II-10 and II-11;

(g) With respect to those Class Members specified in paragraph II-6 of the Stipulation, from applying or enforcing any exclusion of benefits for out-of-hospital prescription drugs prescribed in connection with the treatment of cancer and from applying or enforcing any monetary limits or caps upon the benefits for radiation, chemotherapy or prescription chemotherapy drugs which are contained in any new policy owned by such Class Member;

(h) Subject to any regulatory jurisdiction of any insurance department within the states in which Liberty National's cancer policies were approved for issuance, to pool the experience of all Class Members in all states and file all future premium rates based on the pooled claims and premiums experience of all Class Members in all states in which the old and new cancer policies were approved for issuance, and to use its best efforts to obtain acceptance from all state insurance departments to allow Liberty National to pool the experience of all Class Members for rate making purposes.

5. Subject to this Court's retention of jurisdiction to enforce this Order and the Stipulation of Settlement, all claims asserted in this action, including those claims asserted in Named Plaintiff's Amended Complaint, and all claims which have been or could be asserted (by intervention or otherwise) by or on behalf of any Class Member relating to the "alleged cancer exchange programs" or the "Released Claims" (as those terms are defined in the Stipulation), are DISMISSED in their



entirety on the merits, with prejudice, and defendant Liberty National (and the related beneficiaries of the Release set forth in Section III of the Stipulation of Settlement) are hereby RELEASED from all claims, actions, causes of action and liabilities which could be asserted by or on behalf of any Class Member, which relate to the alleged cancer exchange programs or the Released Claims as defined in the Stipulation of Settlement. The Release provided in Section III of the Stipulation is hereby approved and made effective and incorporated herein by reference.

6. Named Plaintiff and each and all Class Members are hereby permanently ENJOINED, precluded and barred from filing, initiating, asserting, maintaining, pursuing, or continuing or participating as a litigant (by intervention or otherwise) in any action, whether an individual lawsuit or class action, in any court, asserting any of the claims dismissed herein or any of the Released Claims as defined in the Stipulation of Settlement; *provided, however*, that neither this injunction, nor the Stipulation of Settlement described in this order shall apply to any individual who was a named plaintiff in any separate action filed on or before March 10, 1993 which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer policies, unless said action has been voluntarily dismissed without prejudice prior to the date of this Order and Final Judgment.

7. The Escrow Agreement entered into June 16, 1993, between Liberty National and the First Commercial Bank attached as Exhibit "E" to the Stipulation is

approved and its terms and conditions are ratified by the Court.

8. All Proof of Claim Forms shall be submitted by each Class Member entitled under the Stipulation to submit a Proof of Claim Form on or before December 20, 1993 and in the manner as designated in the administrative procedure set forth in the Stipulation of Settlement, otherwise they shall be forever barred from claiming or receiving any of the monetary benefits set forth in paragraphs II-9, II-10 and II-12 of the Stipulation. The Proof of Claim Form attached as Exhibit C to the Stipulation is hereby approved as to form and content.

9. There being no reason for delay, the Clerk of the Court is hereby directed pursuant to Ala.R.Civ.P.54(b), to enter this order as a FINAL JUDGMENT. Subject to the terms and conditions of the Stipulation, Plaintiffs counsel, heretofore approved by the Court as Class Counsel, being Jere Beasley, Beasley, Wilson, Allen, Main & Crow, P.C. and Walter R. Byars, Steiner, Crum & Baker, are jointly awarded \$ \_\_\_ in full payment of all attorneys' fees and \$ \_\_\_ in full payment of all expenses incurred or to be incurred from this action, which will be paid by Defendant Liberty National Life Insurance Company to the Escrow Agent in accordance with the terms of the Escrow Agreement and the Stipulation of Settlement, said attorney's fees together with interest or investment proceeds to be disbursed in accordance with and subject to the terms and conditions of the Stipulation and the Escrow Agreement.

10. Subject to and in accordance with the terms of the Stipulation, Court costs are taxed against Defendant

Liberty National Life Insurance Company, which costs shall include all fees and expenses of actuarial or other experts or consultants employed by Class Counsel hereby awarded in the total amount of \$ \_\_\_ as fees, and \$ \_\_\_ as expenses. Pursuant to Paragraph 11 hereof, this Court reserves jurisdiction to award additional fees and expenses set forth in the Stipulation of Settlement.

11. This Court reserves and maintains continuing jurisdiction over all matters relating to the Settlement or the consummation of the Settlement; the validity of the Settlement; the construction and enforcement of the Settlement and any orders entered pursuant thereto; any disputes which may arise between Class Members with respect to the persons entitled to receive the proceeds of any amounts payable to Class Members under the Stipulation; and the entry and enforcement of this FINAL JUDGMENT, including, in the event of reversal, vacation, or modification of this final judgment, jurisdiction to reinstate all claims dismissed or claims, actions, causes of action and liabilities released pursuant to paragraph 5 hereof; to tax court costs (subject to the terms and conditions of the Stipulation) which shall consist of all expenses for the Class notice, fees and expenses of actuarial or other experts or consultants, fees and expenses of the Special Master; and all other matters pertaining to the Settlement or its implementation and enforcement.

The Court has set forth its Findings of Fact and Conclusions of Law in a separate order entered contemporaneously herewith.

Done this \_\_\_ day of \_\_\_, 1993.

---

CIRCUIT JUDGE

APPROVED AS TO FORM:

/s/ Jere Beasley  
 Jere Beasley  
 Counsel for Named  
 Plaintiffs and Class  
 Beasley, Wilson  
 P. O. Box 4160  
 Montgomery, Alabama  
 36103-4160

/s/ James W. Gewin  
 James W. Gewin  
 Counsel for Defendant  
 Liberty National Life  
 Insurance Co.  
 Bradley, Arant, Rose  
 & White  
 1400 Park Place Tower  
 Birmingham, Alabama  
 35203

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HOLMES & REEVES  
LAWYERS  
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P.O. BOX 290  
MOBILE, ALABAMA  
36601

[Names And Telephone Omitted In Printing]

January 26, 1994

**VIA HAND DELIVERY**

The Honorable William H. Robertson  
Judge, Circuit Court  
Barbour County Courthouse  
Clayton, Alabama 36016

RE: Robertson v. Liberty National  
Case No. CV-91-021

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Dear Judge Robertson:

We today have filed the transcript of the trial in *Edith N. McAllister, et al. v. Liberty National Life Insurance Co. et al.*, CV-92-4085, Circuit Court of Mobile, Alabama, and a copy of Plaintiff's trial exhibits. In this letter we refer the Court to portions of the transcript which we believe are particularly pertinent to the Court's consideration of the fairness of the proposed settlement in this case.

1. Medical Evidence

The most important evidence considered by the jury in the *McAllister* case was the testimony of the Plaintiff's medical experts, Dr. John E. Feldmann and Dr. Michael

Asher, and the Defendants' medical expert, Dr. Michael Meshad. Dr. Feldmann, who is a board certified medical oncologist practicing in Mobile, outlined the history and development of the treatment of cancer with chemotherapy. This testimony provides an overlay to Liberty National's claims experience and demonstrates that, as chemotherapy began to be utilized more frequently and as more expensive and effective chemotherapy drugs were introduced, Liberty National's claims costs on the unlimited benefits for radiation, chemotherapy and prescription drugs skyrocketed.

Dr. Feldmann testified that, in his experience, 50%-60% of cancer patients receive chemotherapy and 65%-80% of cancer patients receive radiation, chemotherapy or both. Dr. Feldmann explained how cancer patients are treated with chemotherapy. According to Dr. Feldmann, over 95% of cancer patients who are treated with chemotherapy receive chemotherapy from a doctor, nurse or technician in office, outpatient or hospital setting and less than 5% receive prescription chemotherapy at home. The vast majority of chemotherapy patients thus are affected by the \$500 cap and only a very small minority utilize the prescription chemotherapy benefit in the new policies. Dr. Feldmann testified that all chemotherapy patients, whether they are treated as outpatient or whether they are prescribed chemotherapy at home, are prescribed pain medication, antibiotics and anti-nausea and diarrhea medicine. Dr. Feldmann testified about the typical costs of these drugs. For example, one of the most common anti-nausea drugs, zophran, costs \$320 for each dose. The cost of morphine can be as much as \$1,000



a month. Dr. Feldmann's testimony emphasizes how Liberty National cut its claims costs at the expense of its policyholders by eliminating coverage for non-chemotherapy prescription drugs in the "new" policies.

Dr. Feldmann also reviewed a number of prescriptions he had written for common chemotherapy programs of treatment which we had priced by the Providence Cancer Center in Mobile. These prescriptions [sic] demonstrate that \$500 a day is not adequate to cover the cost of chemotherapy, now or when the new policies were introduced. For example, the daily cost of the chemotherapy regimen commonly prescribed for ovarian cancer is \$1,603.80.

Dr. Feldmann testified that the unlimited benefits for radiation, chemotherapy and prescription drugs in Liberty National's old policies were material, valuable benefits and that overall the older Liberty National policies were more valuable, superior policies. Dr. Feldmann testified that, in his opinion the new benefits Liberty National added, including the dread disease benefit, do not begin to make up the loss of the unlimited benefits which Liberty National limited or eliminated in the new policies.

Dr. Asher, a board certified radiation oncologist who practices in Mobile, outlined the history of treating cancer with radiation and described the most common types of cancer treated with radiation. He explained how radiation treatments are administered and that cancer patients who are treated with radiation are charged by the treatment center on the first day for a consultation, simulation, preparation of a custom block, a computer plan, port

films, a CT planning scan, diode measurements, a physics chart check and for a "treatment." The patient is also charged by his physician for these same services.

Dr. Asher had prepared a number of prescription [sic] for common treatments for cancer which were priced by the Providence Cancer Center. He testified that, for example, with respect to the treatment for bladder cancer, on the first day of treatment the patient is charged \$1,608.00 by the Cancer Center where the treatment is administered. The patient also receives a charge from the treating oncologist for each of the items enumerated above and for his office, these charges for the first day of treatment for bladder cancer would total \$2,090. Thus, on the first day of treatment for bladder cancer, a patient is charged by the physician and the treatment center a total of \$3,698. While the patient's daily treatments for the next 24 days would only result in charges of \$254 for the treatment, on the 25th day and again on the 32nd day of treatment the patient receives a "boost" and is charged again for all but one of the items charged on the first day. A patient thus has significant exposure over \$500 on at least three days of his treatment.

Dr. Asher testified about the pain medication, anti-nausea and anti-diarrhea medication and antibiotics customarily prescribed to patients who receive radiation and the cost of these drugs. He noted that patients receiving radiation are often also prescribed steroids, anti-depressants and sleeping pills. He reviewed specifics [sic] costs of these drugs, which can run several hundred dollars a month.

Dr. Asher testified that greater than 50% of cancer patients receive radiation and that another 25% receive chemotherapy. In his opinion 70%-75% of cancer patients receive radiation, chemotherapy or both. He noted that today only 50% of cancer patients are cured and that 30%-50% of cancer patients come back for radiation multiple times. He explained that a cancer patient's need for drugs outside the hospital materially increases for that portion of cancer patients who are not cured and who don't survive and that these costs increase exponentially as a patient's condition worsens. Dr. Asher testified that the unlimited benefits for radiation, chemotherapy and prescription drugs were material and valuable benefits.

Even Dr. Meshad, the medical oncologist called as an expert by Libery [sic] National, testified that, in 1987, when Mrs. McAllister's policy was exchanged, \$500 a day was not an adequate amount to cover charges for chemotherapy and is not adequate today. Dr. Meshad's opinion was that, if you are diagnosed with cancer, you are better off with the old policy with unlimited benefits.

Liberty National has contended throughout this litigation that \$500 a day was adequate to cover the cost of radiation and chemotherapy in 1986 when the new policies were first introduced and that it is still adequate today. This contention simply is not borne out by any of the medical testimony.

## 2. Testimony of John Samford

We also urge your Honor to note the testimony of John Samford, a former president of Liberty National, in regard to the profits Liberty National made on the older policies with unlimited benefits from the time they were

initially sold until the loss ratios on these policies began deteriorating in the early 1980's. Liberty National made millions of dollars on premiums paid by policyholders who held these old policies during the 1970's and early 1980's and, when loss ratios on these policies began to deteriorate and the policies became unprofitable, Liberty National switched the policyholders who had the unprofitable old policies to the new policies. When the Court is considering Liberty National's profit from the cancer exchange plan, the profits Liberty National made from these policyholders during the many, many years that these policyholders paid premiums before their policies were exchanged must be taken into account.

## 3. Testimony of Wil Thornthwaite

We advised your Honor at the pre-hearing conference held on January 19, 1994, that the expert witness who testified on behalf of the plaintiffs in the *McAllister* case was on call. Counsel for Liberty National and class counsel agreed that, in the interest of conserving the Court's time, we could submit at the Hearing an affidavit summarizing Mr. Thornthwaite's testimony at the *McAllister* trial. Mr. Thornthwaite's affidavit was marked into evidence by the Clerk at the conclusion of the hearing on Monday, January 24, 1994. We have enclosed for your Honor's reference a copy of the affidavit.

Mr. Thornthwaite reviewed the actual claims paid by Liberty National under a group of the old policies by benefit category with the claims paid under a comparable group of the new policies for the years 1991 and 1992. As is set forth in his affidavit, he concluded that the average benefits paid per policy by Liberty National under the



old policies for these two years was greater than the average benefits paid per policy under the new policies. His computations also demonstrate that the percentage of the total benefits Liberty National paid for radiation, chemotherapy and prescription drugs was greater under the old policies than under the new policies and that Liberty National successfully shrank the amount of claims dollars it was paying on the unlimited benefits.

Mr. Thornthwaite has experience in marketing insurance policies and, in his opinion, the cancer exchange programs were unfair to Liberty National's policyholders. Finally, Mr. Thornthwaite analyzed the premiums paid by Mrs. McAllister for her policy and for her daughter's policy and his calculations demonstrate the extent to which Liberty National increased the premium dollars it collected by moving policyholders from one age bracket to another through the cancer exchange plan.

We urge the Court to carefully review the medical testimony, Mr. Samford's testimony and Mr. Thornthwaite's testimony in the *McAllister* trial.

Respectfully submitted,  
 ARMBRECHT, JACKSON,  
 DeMOUY, CROWE, HOLMES  
 & REEVES

By: /s/ M. Kathleen Miller  
 M. Kathleen Miller

MKM/rm

Enclosure

cc: All Counsel of Record  
 Clerk's Office (for court file)

IN THE CIRCUIT COURT OF  
 BARBOUR COUNTY, ALABAMA  
 CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of a class,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION
LIBERTY NATIONAL LIFE	)	NO. CV-92-021
INSURANCE COMPANY,	)	
Defendant.	)	

MOTION OF LIBERTY NATIONAL WITH CLASS  
COUNSEL'S CONSENT FOR AN ORDER CERTIFYING  
THIS ACTION AS A CLASS ACTION FOR SETTLEMENT  
PURPOSES PURSUANT TO ALABAMA RULES OF  
CIVIL PROCEDURE 23(b)(1)(A), 23(b)(1)(B),  
AND 23(b)(2)

(Filed January 26, 1994)

The defendant in the above-captioned action, Liberty National Life Insurance Company, with the consent of class counsel, moves that this Court enter an order certifying this action as a class action for settlement purposes pursuant to Alabama Rules of Civil Procedure 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2).

In support of this motion, the defendant asserts that the evidence presented to the Court in the January 20, 1994 fairness hearing, the briefs submitted to the court and the totality of the circumstances and the record, show that if this action were not maintained as a class action, separate suits would create a risk of inconsistent adjudications, and would as a practical matter be dispositive of



the interests of other class members or would substantially impede their ability to protect their interests. Moreover, the defendant in this action is alleged to have acted on grounds generally applicable to the class, and this Court's earlier order certifying this action as a class action pursuant to A.R.C.P. 23(b)(2) remains appropriate.

Class Counsel has been orally informed that this motion would be filed and has orally indicated that Class Counsel have no objection to additional certification of the Class Action for purposes of settlement pursuant to A.R.C.P. 23(b)(1).

Attached is an order proposed by counsel for Liberty National for the Court's consideration. Class counsel has not reviewed this proposed order prior to its filing.

**WHEREFORE, PREMISES CONSIDERED,** the defendant moves this Court to enter an Order declaring that this action be maintained as a class action for settlement purposes pursuant to A.R.C.P. 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2).

/s/ James W. Gewin/JWD  
JAMES W. GEWIN

/s/ Michael R. Pennington/JWD  
MICHAEL R. PENNINGTON

/s/ James W. Davis  
JAMES W. DAVIS

Attorneys for Defendant  
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OF COUNSEL:

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/s/ Horace Williams/JWD  
Horace Williams  
Attorney for Defendant  
Liberty National Life Insurance Company

OF COUNSEL:

125 South Orange Avenue  
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---

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing on:

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by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to their regular mailing address, on this 26th day of January, 1994.

/s/ James W. Davis  
OF COUNSEL

IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON,	)	
for himself, and in his	)	
representative capacity for the	)	
class of persons described	)	
herein,	)	Case Number:
Plaintiff	)	CV-92-021
	)	
vs	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant	)	

ORDER AND JUDGMENT CONDITIONALLY  
APPROVING CLASS ACTION SETTLEMENT

(Filed February 4, 1994)

A hearing having been held before this Court on January 20, 21, and 24, 1994, pursuant to the previous Orders of this Court, said hearing having been held on the issue of whether this Court should approve as fair, adequate and reasonable a settlement of this action upon the terms and conditions of the Stipulation and Agreement of Compromise and Settlement heretofore executed by the named plaintiff, class counsel, Defendant Liberty National Life Insurance Company, and Defendant's counsel, as thereafter modified, ("Stipulation" or "Settlement"); it appearing that due notice of said settlement hearing was given in accordance with the terms of this Court's previous Orders; the Court having determined that the notice to the class, as described in the previous Orders of this Court, was the best notice practicable



under the circumstances, and that said notice fully complies with all requirements of due process and Alabama Rule of Civil Procedure 23; the respective parties having appeared in person and by their attorneys of record; various objectors to the settlement having appeared (or having been given the opportunity to appear) in person or by their attorneys of record; the Court having received and considered extensive arguments, evidence, and affidavits and written submissions in connection with the proposed compromise and settlement of the action; the attorneys for the respective parties and the objectors having been heard; and an opportunity to be heard having been given to all of the persons requesting to be heard in accordance with the Orders of this Court and the agreements of counsel made at the fairness hearing which convened on January 20, 1994, after a preliminary hearing had taken place on January 19, 1994; and based on the totality of the record and the totality of the testimony of live witnesses heard and considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. For purposes of considering, approving and effectuating the Stipulation of Settlement and to fairly and adequately protect the interests of the members of the class, this Court has previously ordered, and hereby orders and confirms, that this action is to be maintained as a class action pursuant to Ala.R.Civ.P. 23(b)(2), for a Plaintiff Class consisting of:

All persons who now or in the past were insured under any cancer policy which (1) was issued by Liberty National Life Insurance Company ("Liberty National") on or before August

29, 1986, and (2) which provided benefits for radiation, chemotherapy, prescription chemotherapy drugs, and other out-of-hospital prescription drugs without monetary limits, and (3) was paid and in force (or in the grace period) on or after August 29, 1986, regardless of whether such policy remains in force, thereafter lapsed or was replaced by a different Liberty National cancer policy after that date; provided, however, that (i) any insured who is or was a named plaintiff in any separate lawsuit which was filed on or before March 10, 1993 and which alleges fraud, concealment, failure to disclose or misrepresentation in connection with the purchase, sale, issuance, exchange or replacement of any one or more Liberty National cancer insurance policies is excluded from the Class unless such lawsuit has been voluntarily dismissed without prejudice on or before the date this Settlement is finally approved by the Circuit Court of Barbour County, Alabama; (ii) any insured whose "old policy" lapsed prior to August 29, 1986 and was not thereafter reinstated (after payment by the insured of all delinquent premiums) by Liberty National is excluded from the Class; and (iii) any insured whose first Liberty National cancer policy was a new policy form issued after August 29, 1986 is excluded from the Class.

2. On or about January 26, 1994, Liberty National Life Insurance Company filed a motion seeking an additional certification of the settlement class pursuant to [sic] Rule 23(b)(1)(A) and 23(b)(1)(B). The Court finds this to be essentially a request for an amendment seeking to conform the class certification to be evidence actually submitted (and the testimony presented) at the Fairness Hearing. The Court hereby finds that the requirements of

Rule 23(b)(1)(A) and 23(b)(1)(B) are satisfied based upon the totality of the record. The Court finds for purposes of settlement that if this action were not maintained as a class action, Liberty National could very likely be placed under inconsistent directives. An individual class member in a separate suit could request and obtain equitable relief requiring Liberty National to reform the new policies in a certain way, or to replace the new policies with the old, and Liberty National may defeat a similar request in another suit. Equally possible is the risk that Liberty National could be subject to an inconsistent injunction in a suit brought by a different class member. Furthermore, any injunction requiring "pooling" of different policy groups for purposes of premium increases would necessarily affect the premiums and other interests of insureds other than the named plaintiff, as would any injunction involving reinstatement of old policies or reformation of new policies. Moreover, there is a substantial risk that separate lawsuits could subject Liberty National to attempts by various class members in individual lawsuits to seek multiple punishment against Liberty National for the same alleged conduct that is at issue here.

3. The Court finds for purposes of settlement that the statutory net worth of Defendant Liberty National Life Insurance Company ("Liberty National") is approximately \$327,000,000. The Court further finds that the assets making up said statutory net worth constitute a "limited fund" subject to depletion by individual lawsuits brought by named insured class members (or their additional insured family members) under approximately 400,000 cancer policies if this action were not maintained as a class action. Although the fund is large, so is the

class. Even a small monetary award to each class member would deplete the fund, especially considering the cost to Liberty National of defending separate actions. Moreover, there is a substantial risk that a succession of individual punitive damage suits, if successful, could have the effect of placing Liberty National in receivership or rehabilitation proceedings pursuant to the insurance code of the State of Alabama (or other states) long before its total assets are depleted.

4. The Court further finds for purposes of settlement that, pursuant to the Due Process Clause of the United States Constitution and *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989), and similar authorities in other jurisdictions, if individual damage suits were successful, there is a virtual certainty that before each of the class members insured under the approximately 400,000 cancer policies at issue have the opportunity to bring a suit against Liberty National to a final judgment, Liberty National would be ruled to have been punished enough for the alleged conduct at issue in this action, and to therefore be immune from any further liability for punitive damages. Therefore, if some class members were able to obtain a verdict against Liberty National for punitive damages, at some point, later class members would be unable to obtain punitive damages, even if funds remained to pay those later class members.

5. The Court finds for purposes of settlement that, for the reasons stated above, individuals suits (if successful) could, and in all probability would, result in a determination that "as a practical matter would be dispositive of the interests of other [class] members . . . or substantially impede their ability to protect their interests."



Ala.R.Civ.P. 23(b)(1)(B). The Court further finds for purposes of settlement that this class action settlement, if approved as the Court intends to modify it, and if those modifications are accepted by the named plaintiff, Class Counsel, and Defendant Liberty National Life Insurance Company, will result in the consumption and removal of any and all profit or gain that Liberty National could legitimately be said to have made from the cancer exchange program, and therefore will result in findings that could well be dispositive of future punitive damage claims under the Due Process Clause of the United States Constitution and under *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989), as well as similar authorities in other jurisdictions.

6. For all of the reasons stated above, the Court finds for purposes of settlement that all requirements of Ala.R.Civ.P. 23(b)(1)(A) and 23(b)(1)(B) are met, and at the same time reaffirms that for purposes of settlement all requirements of Ala.R.Civ.P. 23(a) and 23(b)(2) are met. The Court therefore finds that this action is due to be and is hereby certified and maintained as a class action for purposes of settlement pursuant to Ala.R.Civ.P. 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2), by the Named Plaintiff as Class Representative and by the Named Plaintiff's counsel as Class Counsel.

7. The Court expressly finds for purposes of settlement that the class has so many members that joinder is impracticable; that there are questions of law and fact common to the class; that the claims of the Named Plaintiff are typical of the claims of the class; that the representative parties have fairly and adequately protected the interests of the class and will continue to do so; that,

assuming the allegations of the complaint (which Liberty National denies) to be true, Liberty National has acted on grounds generally applicable to the class, thereby making appropriate final equitable and injunctive relief with respect to the class as a whole; that the nature of the interests of the class members, the nature of the settlement, and the fact that the vast majority of class members have not suffered any denial of benefits or suffered any actual out-of-pocket monetary losses or damages at this time (other than the allegation of increased premiums made by certain objectors), make this action inappropriate for certification under Ala.R.Civ.P. 23(b)(3); and that maintenance of this action as a no-opt-out class action pursuant to Rule 23(b)(1) and 23(b)(2) is superior to any other method of proceeding with these claims.

8. Based upon the Court's findings of fact and conclusions of law, which will be entered in due course, the Court has found that the settlement, if modified in certain respects, is fair, reasonable and adequate and ought to be approved. The Court finds that the following modifications to the proposed settlement, if accepted within fourteen days of this order by the Named Plaintiff and Class Representative, Class Counsel and Defendant Liberty National Life Insurance Company, will make the settlement fair and result in final approval of this settlement by this Court:

(a) The provision pertaining to restitution, (Paragraph II-10 of the Stipulation) shall be amended to provide for 150% restitution (in lieu of 100% restitution) on the terms set forth in the Stipulation, with said restitution to be applied only to claims incurred prior to June 16,



1993. The Court finds that this modification will add an additional \$1,000,000 in estimated value to the settlement.

(b) The "Supplemental Extracontractual Monetary Relief Fund for Certain Class Members" set forth in II-12 of the proposed settlement shall be amended so that said fund, which the Court finds to be punitive in nature, shall be increased from \$3,000,000 to \$9,000,000, all other terms and provisions of II-12 of the Stipulation to remain unchanged.

(c) The "Incidental Monetary Settlement Fund for Class Members Who Submitted Certain Claims Under New Policies" set forth in II-9 of the Stipulation shall be amended to increase the fund provided therein, which the Court again finds to be punitive in nature, from \$1,000,000 to \$2,000,000. All other terms and provisions of II-9 of the Stipulation shall remain unchanged.

(d) The premium freeze provided by II-8 of the Stipulation shall be amended to read as follows:

"Pursuant to the Settlement, an Injunction will be entered against Liberty National prohibiting Liberty National from increasing premiums for any old policies of Class Members currently in force and for any new policies of Class Members currently in force prior to the later of the following dates: January 1, 1996; one year from the date of entry of final judgment by this Court; or one year from the date of entry of final judgment by the Alabama Supreme Court in the event of any appeal, any petition for certiorari to the United States Supreme Court notwithstanding. Thereafter, the percentage of any premium rate increase for old policies of Class

Members shall not exceed the percentage of premium rate increases for new policies of Class Members. Liberty National will not implement and is enjoined from implementing any rate increase on the policies of Class Members that results in a projected future incurred loss ratio (incurred claims divided by earned premiums) of less than 55%, calculated on the basis of annual premiums. The requirements of this paragraph do not apply with respect to persons who are not Class Members."

The Court finds that this modification is necessary to remove any opportunity for Liberty National to recover the costs of this settlement through future rate increases, and to effectively preclude Liberty National from so doing. The Court finds that this change in the premium freeze provisions of the proposed settlement adds a value of at least \$6,000,000 to the value of the proposed settlement.

(e) The reinstatement provisions of II-5 of the proposed settlement shall be amended as heretofore provided in the letter of December 10, 1993, executed by Class counsel and counsel for Liberty National Life Insurance Company, a copy of which is attached hereto as Exhibit A.

(f) The proposed settlement shall further be modified to require Liberty National to send a notice to all persons who are then Named Insureds under old policies (as that term is defined in the Stipulation) and who have not suffered cancer during the period the old policies were in force, informing such policyholders that they shall have the option of either keeping the "old policy" they currently hold or exchanging that policy for the 1990

series "Cancer Care Plus" version of the "new policy", as reformed pursuant to the proposed settlement. The notice shall further inform said policyholders that, if the old policy is exchanged to a "new policy", then the "new policy" will require payment of premiums based upon the Class Member's age at the time of the exchange to the new reformed policy, at the then-current premium rates, subject to the premium freeze provisions of the settlement. Said notice shall be submitted to the Court for approval within twenty-one days following final binding affirmance of the final judgment of this Court, or within twenty-one days of the expiration of the time for appeal in the event no appeal is taken. After said notice has been approved by the Court, it shall be mailed to all "old policyholders" contemplated by this modification, and said notice shall give said policyholders at least sixty days in which to exercise their option to exchange the "old policy" for the reformed version of the 1990 Series "Cancer Care Plus" new policy.

(g) The settlement shall be modified to explicitly provide that the reformation provided by Paragraph II-6 of the proposed settlement shall have an effective date of June 16, 1993, even though the injunction requiring said reformation shall not take effect until the final binding affirmance of this Court's final judgment, or, if no appeal was taken from this Court's final judgment, upon the expiration of the time for appeal. The Court finds that this modification to the proposed settlement adds an additional value of at least \$2,000,000 to the proposed settlement.

9. The Court finds that the foregoing modifications to the proposed settlement would result in the addition of

at least \$16,000,000 in additional value to the proposed settlement. The Court further finds that the value of the proposed settlement to Class Members, and the cost of the proposed settlement to Liberty National, was at least \$39,000,000 prior to these modifications. With these modifications, the Court finds that the value of the proposed settlement would be not less than \$55,000,000.

10. Liberty National Life Insurance Company, Named Plaintiff/Class Representative and Class Counsel shall have fourteen days from the date of entry of this order in which to inform the Court as to whether they will accept the foregoing modifications. If parties do not accept the foregoing modifications, the Court reserves the right to disapprove the proposed settlement. In determining that the foregoing modifications should be made to the proposed settlement, the Court has determined that, with such modifications, the cost and value of the proposed settlement is sufficient to remove (and indeed exceed) any and all profit or gain which Liberty National Life Insurance Company could legitimately be said to have made from the cancer exchange program alleged in this action. Therefore, with such modifications, the Court finds that the cost and value of this settlement will be sufficient to punish Liberty National for the entirety of the effects of the alleged cancer exchange programs and the conduct involved therein. The Court further finds that, with such modifications, the proposed settlement, including both the monetary provisions and the equitable provisions, will constitute sufficient deterrence to Liberty National Life Insurance Company from engaging in conduct of the type alleged herein in the future, particularly in light of the broad and sweeping injunctions contained



in the proposed settlement. The Court finds that those injunctions effectively place Liberty National Life Insurance Company under the spectre of being held in contempt of this Court if Liberty National violates this Court's injunctions with respect to Class Members, or if Liberty National fails to honor its obligations under the settlement. The deterrent effect of these injunctions must be weighed in connection with the fairness of this settlement. Taking the totality of the settlement and the totality of the record into consideration, this Court finds that, if the modifications to the settlement are accepted as provided herein, this settlement will be approved, and, in that event, the Court finds that Liberty National will have suffered the full amount of punishment and deterrence that is permissible under the Due Process Clause of the United States Constitution, *Green Oil v. Hornsby's Grocery*, 539 So.2d 218 (Ala. 1989), and similar authorities. If the proposed settlement is accepted as modified by Liberty National, Named Plaintiff/Class Representative and Class Counsel, the Court finds that no further punishment in the way of punitive damages would be appropriate in any other lawsuit seeking punitive damages based upon the alleged cancer exchange programs. In reaching these determinations, the Court notes that, in light of the fact that the claims of many class members would be barred by statutes of limitation; by the death of certain class members; or by other legal defenses, all of which are effectively waived for purposes of this settlement, a great deal of the equitable relief as well as virtually all of the monetary relief provided for in this settlement must be considered punishment for purposes of *Green Oil*.

11. If the foregoing modifications are approved, this Court will enter final judgment incorporating this order by reference, and adopting paragraphs 4 through 11 of the proposed Order and Final Judgment appended to the Class Notice, with appropriate changes to reflect the foregoing modifications. The Court will order counsel for Defendant Liberty National and counsel for Named Plaintiff and the Class to prepare an appropriate proposed Order and Final Judgment, together with proposed Findings of Fact and Conclusions of Law to be adapted by the Court to conform with the Court's own contemplated findings and conclusions, both reflecting the foregoing modifications, for submission to the Court within ten days of such acceptance.

12. This Order is not final, and shall not become so until an Order and Final Judgment are entered by this Court in accordance with the foregoing paragraph. The Court further intends to enter Findings of Fact and Conclusions of Law in a separate order which, when entered, will become a part of this Order.

DONE this the 4th day of February, 1994.

/s/ William H. Robertson  
CIRCUIT JUDGE

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IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	§	
Plaintiff,	§	
	§	
vs.	§	CASE NO.
	§	CV-92-021
LIBERTY NATIONAL LIFE	§	
INSURANCE COMPANY,	§	
	§	
Defendant.	§	

**OBJECTORS' MOTION TO MODIFY COURT ORDER**

(Filed February 24, 1994)

Come now certain objectors listed below and move the Court to modify its final order (assuming said order will, subject to certain terms and conditions certify a class and approve a settlement) in the same respects, to the same extent and on the same grounds set forth in the "Motion to Modify Court Order" heretofore served by class counsel on or about February 15, 1994. Said motion by class counsel is attached hereto as Exhibit A and incorporated herein by reference as if fully set forth herein.

Objectors further move the Court to delete from the Release to be a part of the Court's final order the agents or employees of Liberty National who committed the wrongful acts (including misrepresentations, suppressions, incomplete comparisons, etc.) that resulted in the damage complained of by the objectors. As grounds for deleting said agents and employees from the Release, objectors set down and assign the following:

1. Class counsel did not sue any such agents or employees in this action.

2. The proposed settlement between class counsel and Liberty National, according to class counsel, was based upon many factors, one of which was the funds available from Liberty National with which to satisfy judgments or settlements. At no time was the net worth or available assets of any agent or employee (or any insurance carrier that may have provided coverage for the claims asserted or to be asserted against any such agent or employee) considered to be a factor in the settlement negotiations between Liberty National and class counsel.

3. There has been no discovery regarding the number of different agents or employees involved, what assets or net worth they may possess, what insurance coverage they may have for the claims asserted or to be asserted against them, or any other aspects of the collectability of any judgment as against any such agents or employees.

This motion is filed without waiver of (and while insisting upon) all of the previous objections filed by these objectors, including those objections concerning the propriety of certifying any class and the propriety of the settlement in question.

/s/ Bill Roedder, Jr.

WILLIAM C. ROEDDER, JR.

W. ALEXANDER MOSELEY

GEORGE M. WALKER

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this day, February 23, 1994, served a copy of the foregoing pleading on counsel of record for all parties to this proceeding, by placing same in the United States mail, properly addressed and first class postage prepaid.

/s/ Bill Roedder, Jr.

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**IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division**

**CHARLIE FRANK ROBERTSON,** \*  
for himself, and in his \*  
representative capacity for the \*  
class of persons described herein, \*  
Plaintiff, \*

vs. \*

**LIBERTY NATIONAL LIFE** \*  
**INSURANCE COMPANY,** \*  
Defendant. \*

\* Case Number:  
\* CV-92-021

**MOTION TO MODIFY COURT ORDER**

Plaintiff, by and through Class counsel, moves the Court for an Order (1) deleting the entity designated as the Torchmark Corporation from the Release to be part of the Court's final Order and modifying all prior Orders and documents herein which purport to release Torchmark from liability, and (2) limiting the actions, causes of action, and claims to be released to those alleged in the amended complaint, to-wit: fraud claims arising directly out of the exchange by Liberty National of existing cancer policies through fraudulent misrepresentations concerning the relative value of the policy forms or fraudulent suppression related to the failure to advise insureds of the limitations on benefits for radiation, chemotherapy, prescription chemotherapy drugs, and out-of-hospital prescription drugs contained in the new policies. As grounds for the motion, Plaintiff states:

[Exhibit A]

1. Class counsel did not sue Torchmark in this action and have based all negotiations on the activities of Liberty National and its employees.

2. The proposed settlement with Liberty National by class counsel was based upon many factors, one of which was the net worth of Liberty National. At no time was the net worth of Torchmark considered to be a factor.

3. If, in fact, the assertions and testimony by Liberty National are correct (that Torchmark had no involvement in the alleged fraud), there can be no prejudice to Torchmark from the deletion.

4. There is no logical reason for the release of Torchmark, in addition to Liberty National, since Torchmark was never a party to this action.

5. The definition of claims, causes of action, and actions to be released was never intended by class counsel to be any broader than those restricted to fraud claims arising directly out of the exchange of cancer policies by Liberty National as described in Plaintiff's amended complaint.

6. It appears from evidence and materials submitted by objectors that there may be claims by insureds which are unrelated to those presented in this lawsuit but which arguably could be released by the broad language of the release proposed by Liberty National.

/s/ Jere L. Beasley  
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#### CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all counsel of record *as listed below* by placing a copy of same in the United States Mail, first class, postage prepaid on this the 15th day of February, 1994.

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IN THE CIRCUIT COURT OF BARBOUR  
COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
	)	
Plaintiff,	)	CASE NO.
	)	CV-92-021
vs	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY	)	
	)	
Defendant.	)	

OBJECTORS' MOTION TO MODIFY COURT ORDER  
(Filed February 28, 1994)

Come now certain objectors listed below and move the Court to modify its final Order (assuming said Order will, subject to certain terms and conditions, certify a class and approve a settlement) in the same respects, to the same extent and on the same grounds set forth in the "Motion to Modify Court Order" heretofore served by class counsel on or about February 15, 1994. Said motion by class counsel is attached hereto as Exhibit A and incorporated herein by reference as if fully set forth herein.

Objectors further move the Court to delete from the Release to be a part of the final Order the agents or employees of Liberty National who committed the wrongful acts (including misrepresentations, suppressions, incomplete comparisons, etc.) that resulted in the damage complained of by the Objectors. As grounds for deleting said agents and employees from the Release, Objectors set down and assign the following:

1. Class counsel did not sue any such agents or employees in this action.

2. The proposed settlement between class counsel and Liberty National, according to class counsel, was based upon many factors, one of which was the funds available from Liberty National with which to satisfy judgments or settlements. At no time was the net worth or available assets of any agent or employee (or any insurance carrier that may have provided coverage for the claims asserted or to be asserted against any such agent or employee) considered to be a factor in the settlement negotiations between Liberty National and class counsel.

3. There has been no discovery regarding the number of different agents or employees involved, what assets or net worth they may possess, what insurance coverage they may have for the claims asserted or to be asserted against them, or any other aspects of the collectability of any judgment as against any such agents or employees.

This motion is filed without waiver of (and while insisting upon) all of the previous objections filed by these Objectors, including those objections concerning the propriety of certifying any class and the propriety of the settlement in question.

/s/ George W. Finkbohner  
GEORGE W. FINKBOHNER, III  
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# CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 25th day of  
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/s/ George W. Finkbohner  
GEORGE W. FINKBOHNER, III

---



IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON,*	*	
for himself, and in his	*	
representative capacity for the	*	Case Number:
class of persons described	*	CV-92-021
herein,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
LIBERTY NATIONAL LIFE	*	
INSURANCE COMPANY,	*	
	*	
Defendant.	*	

MOTION TO MODIFY COURT ORDER

Plaintiff, by and through Class counsel, moves the Court for an Order (1) deleting the entity designated as the Torchmark Corporation from the Release to be part of the Court's final Order and modifying all prior Orders and documents herein which purport to release Torchmark from liability, and (2) limiting the actions, causes of action, and claims to be released to those alleged in the amended complaint, to-wit: fraud claims arising directly out of the exchange by Liberty National of existing cancer policies through fraudulent misrepresentations concerning the relative value of the policy forms or fraudulent suppression related to the failure to advise insureds of the limitations on benefits for radiation, chemotherapy, prescription chemotherapy drugs, and out-of-hospital prescription drugs contained in the new policies. As grounds for the motion, Plaintiff states:

[Exhibit A]

1. Class counsel did not sue Torchmark in this action and have based all negotiations on the activities of Liberty National and its employees.

2. The proposed settlement with Liberty National by class counsel was based upon many factors, one of which was the net worth of Liberty National. At no time was the net worth of Torchmark considered to be a factor.

3. If, in fact, the assertions and testimony by Liberty National are correct (that Torchmark had no involvement in the alleged fraud), there can be no prejudice to Torchmark from the deletion.

4. There is no logical reason for the release of Torchmark, in addition to Liberty National, since Torchmark was never a party to this action.

5. The definition of claims, causes of action, and actions to be released was never intended by class counsel to be any broader than those restricted to fraud claims arising directly out of the exchange of cancer policies by Liberty National as described in Plaintiff's amended complaint.

6. It appears from evidence and materials submitted by objectors that there may be claims by insureds which are unrelated to those presented in this lawsuit but which arguably could be released by the broad language of the release proposed by Liberty National.

/s/ Jere L. Beasley  
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IN THE CIRCUIT COURT FOR  
 BARBOUR COUNTY, ALABAMA  
 Clayton Division

CHARLIE FRANK, ROBERTSON,	*	
for himself, and in his	*	
representative capacity for the	*	
class of persons described herein.	*	
Plaintiff,	*	
vs.	*	CASE NO.
	*	CV-92-021
LIBERTY NATIONAL LIFE	*	
INSURANCE COMPANY,	*	
Defendant.	*	

OBJECTORS' MOTION TO MODIFY COURT ORDER  
 (Filed March 2, 1994)

Comes now certain objectors listed below and move the Court to modify its final order (assuming said order will, subject to certain terms and conditions certify a class and approve a settlement) in the same respects, to the same extent and on the same grounds set forth in the "Motion to Modify Court Order" heretofore served by class counsel on or about February 15, 1994. Said motion by class counsel is attached hereto as Exhibit A and incorporated herein by reference as if fully set forth herein.

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1. Class counsel did not sue any such agents or employees in this action.

2. The proposed settlement between class counsel and Liberty National, according to class counsel, was based upon many factors, one of which was the funds available from Liberty National with which to satisfy judgments or settlements. At no time was the net worth or available assets of any agent or employee (or any insurance carrier that may have been provided coverage for the claims asserted or to be asserted against any such agent or employee) considered to be a factor in the settlement negotiations between Liberty National and class counsel.

3. There has been no discovery regarding the number of different agents or employees involved, what assets or net worth they may possess, what insurance coverage they may have for the claims asserted or to be asserted against them, or any other aspects of the collectability of any judgment as against any such agents or employees.

This motion is filed without waiver of (and while insisting upon) all of the previous objections filed by these objectors, including those objections concerning the propriety of certifying any class and the propriety of the settlement in question.

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CERTIFICATE OF SERVICE

I do hereby certify that I have, on this 28 day of Feb.,  
1994, served a copy of the foregoing pleading on counsel  
of record for all parties to this proceeding, by placing  
same in the United States mail, properly addressed and  
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/s/ John D. Richardson

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IN THE CIRCUIT COURT FOR  
 BARBOUR COUNTY, ALABAMA  
 Clayton Division

CHARLIE FRANK, ROBERTSON,  
 for himself, and in his  
 representative capacity for the  
 class of persons described herein.

Plaintiff,

vs.

LIBERTY NATIONAL LIFE  
 INSURANCE COMPANY,

Defendant.

•  
 •  
 •  
 •  
 •  
 • CASE Number  
 • CV-92-021  
 •  
 •  
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 •

MOTION TO MODIFY COURT ORDER

Plaintiff, by and through Class counsel, moves the Court for an Order (1) deleting the entity designated as the Torchmark Corporation from the Release to be part of the Court's final Order and modifying all prior Orders and documents herein which purport to release Torchmark from liability, and (2) limiting the actions, causes of action, and claims to be released to those alleged in the amended complaint, to-wit: fraud claims arising directly out of the exchange by Liberty National of existing cancer policies through fraudulent misrepresentations concerning the relative value of the policy forms or fraudulent suppression related to the failure to advise insureds of the limitations on benefits for radiation, chemotherapy, prescription chemotherapy drugs, and out-of-hospital prescription drugs contained in the new policies. As grounds for the motion, plaintiff states:

[Exhibit A]

1. Class counsel did not sue Torchmark in this action and have based all negotiations on the activities of Liberty National and its employees.

2. The proposed settlement with Liberty National by class counsel was based upon many factors, one of which was the net worth of Liberty National. At no time was the net worth of Torchmark considered to be a factor.

3. If, in fact, the assertions and testimony by Liberty National are correct (that Torchmark had no involvement in the alleged fraud), there can be no prejudice to Torchmark from the deletion.

4. There is no logical reason for the release of Torchmark, in addition to Liberty National, since Torchmark was never a party to this action.

5. The definition of claims, causes of action, and actions to be released was never intended by class counsel to be any broader than those restricted to fraud claims arising directly out of the exchange of cancer policies by Liberty National as described in Plaintiff's amended complaint.

6. It appears from evidence and materials submitted by objectors that there may be claims by insureds which are unrelated to those presented in this lawsuit but which arguably could be released by the broad language of the release proposed by Liberty National.

/s/ Jere L. Beasley  
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#### CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all counsel of record *as listed below* by placing a copy of same in the United States Mail, first class, postage prepaid on this the 15th day of February, 1994.

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IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK	§	
ROBERTSON, for himself, and	§	
in his representative capacity	§	
for the class of persons	§	
described herein,	§	CASE NUMBER:
	§	CV-92-021
Plaintiff,	§	
	§	
vs.	§	
	§	
LIBERTY NATIONAL LIFE	§	
INSURANCE COMPANY,	§	
	§	
Defendant.	§	

BRIEF IN SUPPORT OF THE MOTIONS OF  
OBJECTORS AND CLASS COUNSEL TO MODIFY  
COURT ORDER TO DELETE TORCHMARK  
CORPORATION FROM THE RELEASE

(Filed August 13, 1994)

Come now the undersigned counsel for certain Objectors and file this Brief in support of the motions of Objectors and Class Counsel seeking an Order deleting Torchmark Corporation ("Torchmark") from the Release to be part of the proposed settlement herein and modifying all prior Orders and documents herein which purport to release Torchmark from liability.

In conjunction with and in support of the grounds set forth in the above-referenced motions, the undersigned show unto the Court that evidence has been developed which demonstrates that Torchmark (the sole shareholder of Liberty National Insurance Company ("Liberty

National")) is exposed to liability for the cancer policy exchange programs ("CPEP") which are the subject of this litigation. As is discussed below, based on the evidence which has been developed to date, Torchmark's exposure to liability rests on its own conduct in connection with the CPEP, its failure to properly investigate claims arising out of the CPEP and its control of Liberty National. This evidence constitutes an initial showing in regards to Torchmark's exposure to liability and clearly imposes a duty upon this Court to refrain from allowing Torchmark to be released from all liability with respect to the CPEP absent payment of appropriate consideration.

- A. Torchmark is subject to liability for Liberty National's acts based upon Torchmark's domination and misuse of Liberty National which resulted in harm to Liberty National's policyholders.

In Alabama, a parent corporation which owns all the stock of a subsidiary corporation may be held liable for the acts of the subsidiary if the parent so controls the operation of the subsidiary as to make the subsidiary a mere adjunct instrumentality, or alter ego of the parent and this control results in harm caused by the misuse of the subsidiary. *Duff v. Southern Railway Co.*, 496 So. 2d 760, 762 (Ala. 1986); *In re Birmingham Asbestos Litigation*, 619 So. 2d 1360, 1361 (Ala. 1993). Holding a parent corporation liable under these circumstances is commonly referred to as "piercing the corporate veil."

Determining the issues of control and misuse require extensive factual showings. In this vein, a noted commentator in the area of corporate law has recognized "that the determination of whether there are sufficient grounds for piercing the corporate veil ordinarily should *not* be disposed of by summary judgment, in view of the complex economic questions often involved, *especially if fraud is alleged.*" Fletcher CYC Corp. § 41.95 (Perm. ed.) (emphasis added). As is set forth in Objectors' motion for additional discovery filed on even date herewith, Objectors have not yet had an opportunity to fully develop the evidence against Torchmark. The discovery conducted to date, however, has unveiled sufficient evidence to demonstrate that Torchmark has exposure for liability on the ground that Liberty National and Torchmark were so interrelated that Torchmark dominated Liberty National and caused Liberty National to become a mere adjunct instrumentality and alter ego of Torchmark.

No one should know the interrelationship between Liberty National and Torchmark any better than John Samford. He was President and/or CEO of Liberty National and on the Board of Liberty National from 1982 through 1989; during this same time he was also on the Torchmark Board of Directors, and for the period 1989-1982 he was Executive Vice President and Associate General Counsel of Torchmark (John Samford Dep., pp. 6-8, 47; written responses of Torchmark to discovery propounded by Class Counsel, a copy of which, along with a copy of the discovery propounded by Class Counsel, is attached hereto as Exhibit A).<sup>1</sup> John

<sup>1</sup> The undersigned Objectors have not filed copies of the transcripts of the referenced depositions and the exhibits thereto which Objectors understand are being filed by Class

Samford testified that, throughout the time he served as President and/or CEO of Liberty National, he ultimately was answerable not to Liberty National, but to the Torchmark Board of Directors (John Samford Dep., p. 9). Mr. Samford, as CEO of Liberty National, periodically consulted and talked with various employees of Torchmark (John Samford Dep., p. 9). Moreover, he made reports from time to time to the Board of Directors of Torchmark regarding the operations of Liberty National (John Samford Dep., pp. 9, 10).

In addition to reporting to the Torchmark Board of Directors, John Samford reported to the Chairman of the Torchmark Board outside of the regular Board meetings (John Samford Dep., p. 11). Mr. Samford kept the Chairman of the Torchmark Board advised regarding significant events occurring within Liberty National (John Samford Dep., p. 12).

The Liberty National Board of Directors clearly did not function as anyone would expect a board of directors to function. For example, John Samford testified that, after he became president, the size of the Liberty National Board of Directors was reduced to three and it functioned only in an advisory or public relations capacity (John Samford Dep., pp. 48-49). Mr. Samford, as noted above, then reported to the Torchmark Board of Directors, not the Liberty National Board of Directors, and the Liberty National Board of Directors discontinued meeting, except in the form of paper meetings by unanimous consent (John Samford Dep., pp. 48-49).

Counsel. Objectors rely upon said depositions and exhibits in their entirety and reserve the right to file copies of the same if Class Counsel fails to do so.



From the records, the last meeting of the Board of Directors of Liberty National took place on February 26, 1985. (Minutes of the 56th Annual Meeting of the Board of Directors of Liberty National Life Insurance, February 26, 1985, a copy of which, along with copies of all consents by the members of the Board of Directors of Liberty National in Lieu of Meeting referred to herein, is attached hereto as Exhibit B.) Thereafter, records reflect that the Board of Directors of Liberty National agreed to operate without a formal meeting. (See Consent by Board of Directors of Liberty National in Lieu of Meeting, February 25, 1986, July 22, 1986, and February 26, 1987., attached as Exhibit B)

It is easy to see how the identity of the two corporations has blurred over time and is now non-existent. As Bob Stewart, a former President of Liberty National, testified before this Court "it is hard to distinguish between the two." (Robert Stewart, transcript p. 12).

C. B. Hudson, who has been a Torchmark Board Member since 1986, a Liberty National Board Member and President and/or CEO of Liberty National since 1990, and a Torchmark officer since 1992, supports John Samford's testimony. As an officer of Liberty National, Mr. Hudson reported and was responsible to the Torchmark Board of Directors, not the Liberty National Board of Directors. (Hudson Dep., pp. 9-10, 55; Torchmark's response to written discovery propounded by Class Counsel, attached as Exhibit A). Mr. Hudson further testified that the Liberty National Board of Directors has no real role (Hudson Dep., p. 54). In fact Mr. Hudson stated that the Liberty National Board of Directors does not even serve in an advisory capacity (Hudson Dep., p. 54).

Not just the President and CEO of Liberty National, but also other Liberty National officers report to the Torchmark Board of Directors (Hudson Dep., pp. 63-64).

Mr. Hudson testified that, as President and CEO of Liberty National, he reports any significant developments in the operations of Liberty National to the Torchmark Board (Hudson Dep., p. 21). New products are discussed in Torchmark Board meetings if a large volume of sales were expected (Hudson Dep., pp. 21-22). The 1990 CPEP, just as the 1986 CPEP, involved a large volume of policy exchanges (Hudson Dep., p. 31). Accordingly, as President and CEO of Liberty National, Mr. Hudson reported the 1990 CPEP to the Torchmark Board of Directors. (Hudson Dep., p. 31).

Similarly, as a member of the Torchmark Board in 1986, Mr. Hudson can recall Mr. Samford (then President and CEO of Liberty National) reporting to him and other Torchmark Board Members regarding the 1986 CPEP (Hudson Dep., p. 24-25). Subsequent to 1986, Mr. Hudson had a [sic] occasion to discuss lawsuits with Mr. Richey, then Chairman of the Board of Torchmark (Hudson Dep., pp. 57-58). Mr. Hudson received reports regarding these lawsuits from Liberty National's in-house counsel, Bill Barcliff on a prompt basis, and Mr. Hudson would in turn discuss them on occasion with Mr. Richey (Hudson Dep., pp. 57-58). The CPEP lawsuits alleging fraud began to be filed in 1990 (Torchmark's response to written discovery propounded by Class Counsel).

Although Torchmark obviously was aware of the CPEP as early as its inception and received complaints that it might involve massive fraud in (1990 and 1991) (at



the latest) there is no evidence that either Liberty National or Torchmark as [sic] since taken any steps, even to date, to rectify this situation. In fact, the various cancer policies apparently continue to be exchanged. This clearly evidences misuse of Torchmark's control of Liberty National. This misuse continues to cause harm to unsuspecting members of the public much like it caused harm to members of the Plaintiff Class by fraudulently stripping them of valuable benefits.

Torchmark can hardly contend that it was an entity separate and distinct from Liberty National and that it remained ignorant of the details regarding the operations of Liberty National. Liberty National officers and board members clearly possessed that detailed knowledge from their day-to-day operations as officers and directors of Liberty National, and some considerable number of these Liberty National officers and directors were also board members or officers of Torchmark. Consider the following:

I. Mr. Richey was an officer and director of Liberty National who also served as CEO of Torchmark and on the Board of Torchmark.

II. Mr. John Samford was an officer and board member of Liberty National, who also served as an officer and board member of Torchmark.

III. Mr. Ray was an officer of Liberty National, and also served as an officer of Torchmark.

IV. Mr. Lovin was an officer of Liberty National, and also served as an officer of Torchmark.

V. Mr. Graves was a board member of Liberty National, and also served as an officer of Torchmark.

VI. Mr. Hudson was an officer and board member of Liberty National, and also served as an officer and board member of Torchmark.

VII. Mr. Upchurch was an officer of Liberty National, and also served as an officer and board member of Torchmark.

VIII. Mr. Tucker a director of Liberty National, who also served as a director and officer of Torchmark. (Torchmark's response to written discovery propounded by Class Counsel).

The foregoing evidences complete domination and control of Liberty National by Torchmark. Further, Liberty National's status as mere adjunct instrumentality or alter ego of Torchmark is clear. Also clear is that Torchmark misused its control of Liberty National for the purpose of increasing its profits (and director bonuses) while causing harm to hundreds of thousands of policyholders.

In addition to the foregoing, the investment of Liberty National's assets, which are obviously very substantial, is handled by Torchmark (Hudson Dep., p. 66). Some 15 to 20 Liberty National officers (and this excludes directors) were on the Torchmark payroll. Many of the directors of Liberty National are also employees of Torchmark and when Torchmark employees perform duties for Liberty National, it is under the supervision of Torchmark management (see Torchmark's response to written discovery propounded by Class Counsel, attached as Exhibit A).

Yet another interrelationship between Torchmark and Liberty National is that Torchmark leases space in Liberty National's building, where Torchmark conducts its business; Torchmark uses aircraft that are owned by Liberty National; and Torchmark uses Liberty National clerical employees, Liberty National's computer and data processing equipment and furnishings provided by Liberty National. (See Torchmark and Liberty National responses to written discovery propounded by Class Counsel).

The compensation paid to Torchmark's directors was related to Liberty National's performance. In 1993, Torchmark paid Mr. Hudson a salary of \$650,000.00, a bonus of \$350,000.00 and other compensation of \$35,000.00. (Torchmark 1993 Proxy Statement, p.11, attached as Exhibit C). Mr. Hudson was also granted an option to purchase 35,000 shares of the common stock of Torchmark at a price of \$43.50 per share. (*Id.*) Hudson testified that his compensation was, in part, dependent upon the performance of Liberty National (Hudson Dep., p. 69-70).

In 1993, Torchmark paid Mr. Richey a salary of \$1,166,676.00, a bonus of \$833,324.00 and other compensation of \$137,162.00. (Torchmark 1993 Proxy Statement, p. 11, a copy of which is attached hereto as Exhibit C). Mr. Richey's 1993 compensation included stock options to purchase 62,000 shares of the common stock of Torchmark at \$43.50 per share. (*Id.*)

Some of the years Mr. Richey was CEO of Torchmark he received a bonus in addition to salary. (Richey Dep., p. 57). The bonus was based in part upon the realization of insurance operating goals of Torchmark subsidiaries, including Liberty National. (*Id.* at 57-58).

The Alabama Supreme Court has outlined the common circumstances showing that a subsidiary is the mere instrumentality of a parent corporation as follows:

- (a) The parent corporation owns all or most of the capital stock of the subsidiary.
- (b) The parent and subsidiary corporations have common directors or officers.
- (c) The parent corporation finances the subsidiary.
- (d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
- (e) The subsidiary has grossly inadequate capital.
- (f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
- (g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
- (h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.
- (i) The parent corporation uses the property of the subsidiary as its own.
- (j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's [sic] interest.



- (k) The formal legal requirements of the subsidiary are not observed.

*Duff v. Southern Railway Co.*, 496 So. 2d at 763. In adopting these factors, the Court stated that "[n]o one of these factors is dispositive; nor does the list exhaust the relevant factors." *Id.* at 763.

The evidence available to date in this case as outlined above demonstrates that at least seven of the eleven "circumstances" set forth in *Duff* exist between Torchmark and Liberty National. The available evidence certainly constitutes an initial showing that Liberty National was a mere instrumentality of Torchmark and that Torchmark has exposure to liability based upon its control, domination and misuse of Liberty National.

**B. Torchmark is liable to the Plaintiff class for its own negligence in connection with the cancer policy exchange program.**

The evidence outlined above indicates that Torchmark unquestionably had knowledge of the CPEP, was aware of its purpose and, in effect, supervised Liberty National's progress in carrying out the program. In light of the extent of Torchmark's knowledge and involvement with the CPEP, Torchmark either knew or should have known of the activities of Liberty National's agents and should have corrected their activities. A parent corporation can be liable for its own negligence, without regard to the traditional requirements of piercing the corporate veil, if it can be shown that the parent directly participated in the acts of the subsidiary. See *Anglo Eastern*

*Bulkships, Ltd. v. Ameron, Inc.*, 556 F. Supp. 1198, 1201 (S.D.N.Y. 1982).

As outlined above, the President, CEO and other officers of Liberty National reported directly to and were ultimately responsible to the Board of Directors of Torchmark. That Board was all powerful and virtually ran all of the affairs of Torchmark and Liberty National. It was given virtually all powers of the corporation. (See Board of Directors Manual, Exhibit T2). Even the four standing committees of Torchmark were controlled by the Torchmark Board. The Executive Committee consisted of the Chairman of the Board, the President and three additional members that were elected by the Directors from among their own number. (See Board of Directors Manual, Exhibit T2). The Compensation Committee was elected by the Board of Directors from its own membership. (See Board of Directors Manual, Exhibit T2). The Audit Committee was also elected by the Directors from among their own number. (See Board of Directors Manual, Exhibit T2). Finally, the Finance Committee was similarly elected by the Directors from among their own number. (See Board of Directors Manual, Exhibit T2). All officers were elected by the Board and performed such duties as the Board directed. (See Board of Directors Manual, Exhibit T2). Accordingly, the Board of Directors of Torchmark in essence was Torchmark, and it was to this Board and this corporation that the Liberty National officers were responsible.

The Torchmark Board of Directors had many legal responsibilities, which it could not have fulfilled without making more inquiry than was made and without detailed, hands-on supervision of the Liberty National



officers, which the Board members contend they did not exercise. Their duties essentially required that they closely supervise the Liberty National officers and make thorough, competent inquiry where problems surfaced, such as the Stewart complaint (discussed hereinbelow) concerning massive fraud in connection with the CPEP. The members of the Torchmark Board clearly breached these duties. Accordingly, Torchmark must be held accountable for this conduct.

The responsibilities of the Board Members, as testified to by Yetta Samford (Yetta Samford Dep., p. 12, 67-68), and as shown in the Board of Directors Manual (Exhibit T2), are as follows: they owe a duty of care and a duty of loyalty; they were obliged to exercise due care and diligence in managing the affairs of the corporation; they were required to perform these duties in good faith and in a non-negligent manner; they were obliged to conduct themselves in the best interests of the corporation; and, in order to satisfy their fiduciary duties, the Directors were obliged to keep themselves informed as to the policies and affairs of the corporation and as to the acts of its officers. The policies and affairs of the corporation included the management of the officers of Liberty National and the conduct of the Liberty National business. The presidents and CEOs of Liberty National have testified that they were responsible to the Torchmark Board, not the Liberty National Board. Clearly the Torchmark Board undertook to supervise these officers and to hold them accountable for their failings. The duty of the directors included a duty to make reasonable investigation as to the veracity of information furnished. (Board of Directors Manual, Exhibit T2).

There is ample evidence reflecting Torchmark's knowledge and supervision of the CPEP. In addition to the evidence outlined above, Torchmark Board Member Yetta Samford has testified that there was a discussion by the Torchmark Board of Liberty National's cancer conversion program. (Y. Samford Dep., p. 40). He also recalled discussions at a Torchmark Board of Directors meeting concerning a very large increase in annual premium from the sale of Liberty National cancer insurance between 1985 and 1986. (Y. Samford Dep., p. 45). Yetta Samford testified that he was told that the reason for this very large increase was the marketing [sic] of a new and better policy. (*Id.* at 45-46). Yetta Samford testified that the Torchmark Board was told that the cancer conversion program would benefit the company and that it involved the marketing of a better policy. (*Id.* pp. 64-65).

On December 19, 1985 the Board of Directors of Torchmark were informed that the loss ratios on their cancer policies were declining resulting in increased policy obligations. (See Minutes of the Meeting of the Board of Directors of Torchmark, December 19, 1985, p. 10, attached as Exhibit B.) Thereafter, Torchmark was aware that Liberty National had introduced a new cancer policy which had produced sales of 6.2 million dollars in only two months of being on the market. (See Torchmark Management Report, October 31, 1986, p. 6., Exhibit T26). The Torchmark Management Report reflects that sales in the cancer line had increased from August 31, 1986 from \$1,033,000.00 annualized premium to \$5,708,000.00 ending October 31, 1986. (Torchmark Management Report, October 31, 1986, p. 8, Exhibit T26). The Management Report does not reflect any other product, whether health

or life, with such a drastic increase in sales. (*Id.*, Exhibit T26). By November 30, 1986, after only being on the market three months, the new cancer policy introduced in September had produced sales of 8.4 million dollars (net of replacement). (Torchmark Management Report, November 30, 1986, p. 6, Exhibit T25).

Torchmark was on notice that the 1990 CPEP had also produced enormous profits and that virtually all the increase in the second quarter of 1990 versus the second quarter of 1989 was due to cancer conversions resulting from the new cancer products which were introduced in the first quarter of 1990. (Minutes of the Board of Directors of Torchmark, July 26, 1990, p. 9, a copy of which is attached hereto as Exhibit D). In fact, Torchmark realized \$55.4 million in health sales in 1990 of which \$26.7 million was directly attributable to replacement of older cancer policies. *Id.*

John Samford testified as to the reasons for the CPEP. The loss ratios on the old cancer policy were too high, causing Liberty National to increase premiums substantially and frequently (John Samford Dep., pp. 17-18). Liberty National found this to be an undesirable development and determined that the cause of the high loss ratios under the old policies was that the benefits for chemotherapy and radiation were unlimited (John Samford Dep., pp. 18-19). Liberty National began to discuss and address this problem in 1985, the year before the CPEP was initiated (John Samford Dep., p. 19). The thought was (and this thought was acted on in August, 1986) that Liberty National should go to a new cancer policy with changes or caps on these benefits in order to avoid the high loss ratio problem experienced on the old

policies with unlimited benefits. (John Samford Dep., pp. 16-19).

There was more in the CPEP for Liberty National than reducing loss ratios, as attractive as this obviously was; if old policies were exchanged for new policies, this would increase the total revenues of Liberty National, and John Samford frankly testified that he wanted to see the old policies exchanged for the new policies (John Samford Dep., p. 33). Likewise, the agents must have been pushing the exchanges, because they received more in the way of commissions when the old policy was exchanged for the new policy, as opposed to the commissions they would have received if the old policy remained in effect. (John Samford Dep., p. 34). The far reaching implications of the CPEP are demonstrated by the fact that there were some 400,000 holders of the old cancer policy as of the time the CPEP was undertaken (data previously submitted to the Court by Liberty National).

Mr. Samford regarded the CPEP as a "major product change" for Liberty National (John Samford Dep., p. 30). Not unexpectedly, Mr. Samford testified that he believed the CPEP (including the difference between the benefits provided in the old and the new policies) was discussed with the Torchmark Board of Directors at or about the time that the new policy was offered in August of 1986. (John Samford Dep., pp. 37-39).

Indeed, the CPEP was so significant in the life of Liberty National that John Samford, himself, the President and CEO, was directly involved from time to time in the training and marketing plans that were developed in connection with the issuance of the new policy and the



plan to have existing policyholders exchange their old policy for the new one (John Samford Dep., pp. 30-31). Moreover, all departments of Liberty National, including marketing, legal and others, became involved in the development of detailed plans regarding the development of this new product and its introduction to the market place. (John Samford Dep., pp. 24-25). Mr. Samford, himself, authorized the development and approval of the new policy and had studied it in some detail; he knew that the new policy placed limits on benefits for radiation and chemotherapy that did not exist under the old policy (John Samford Dep., pp. 26-27). Indeed, as indicated above, he believed it so significant that it was reported to the Torchmark Board of Directors in some detail (John Samford Dep., pp. 37-39). Even information regarding the loss ratios under the old cancer policies, which, as indicated elsewhere herein, were the moving force behind the development of the cancer exchange program, was available to the Torchmark Board of Directors (John Samford Dep., pp. 23-24).

It is apparent that little, if anything, was done in connection with this massive CPEP to insure that misrepresentations and fraudulent practices did not pervade the entire program. Little or nothing was done despite the fact that this was, by definition, an exchange program where some 400,000 existing policyholders, then having policies that provided unlimited benefits for radiation and chemotherapy, were going to be approached by insurance agents that would inevitably be making comparisons from one policy to the other (the old to the new). It is in the comparison of two different policies that lay people (policyholders) are perhaps most susceptible to

misrepresentations and incomplete and inaccurate comparisons. In understanding comparisons of two policies, they are at the mercy of the insurance agents who are much more knowledgeable than they. Yet when John Samford was asked what he did to insure that the old policyholders understood the changes before being switched, he said simply that he relied upon the departments under him to insure this; when asked what he did to insure that those departments under him performed this function properly, his response was that he could not recall doing anything in this regard. (John Samford Dep., pp. 44-45).

This evidence clearly demonstrates that the board of Torchmark was directly involved in the policy exchange program at least in a direct supervisory capacity and the board of Torchmark directly participated in the fraud visited on the policyholders or, in the alternative, were negligent in their supervision of the Liberty National personnel.

- C. **By voluntarily undertaking an investigation of the cancer policy exchange program, Torchmark assumed a duty to investigate with due care and, therefore, is liable based on its negligent failure to conduct a reasonable investigation.**

Alabama law is clear that "[o]ne who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care and is liable for negligence in connection therewith." *Parker v. Thyssen Mining Const., Inc.*, 428 So. 2d 615, 618 (Ala. 1983). The existence of a voluntarily assumed duty "is a matter for



determination in light of all the facts and circumstances." *Chandler v. Hospital Authority of the City of Huntsville*, 548 So. 2d 1384, 1387 (Ala. 1989). Discovery to date demonstrates that Torchmark assumed a duty, beyond which it had a responsibility to provide as a shareholder, when an officer and member of its board voluntarily undertook an investigation of the cancer policy exchange program.

In March, 1990, Mr. Bob Stewart, former CEO of Liberty National and member of the Board of Torchmark, mailed a letter to Mr. Upchurch expressing concern that a comparison chart used by a Liberty National District Office was an attempt to confuse policyholders into switching out of the old unlimited policy. (Upchurch Dep., p. 28). Although Mr. Stewart was fully aware that Liberty National had its own general counsel and legal department, Mr. Stewart chose to mail the letter to Mr. Upchurch as general counsel for Torchmark. (Upchurch Dep., p. 36). Mr. Upchurch never personally checked to see if the comparison chart was inaccurate, and in fact never reviewed the comparison chart which Mr. Stewart alleged was inaccurate. (Upchurch Dep., p. 29). Mr. Stewart's letter informed Mr. Upchurch that there were intentional fraudulent actions being undertaken by Liberty National agents and Mr. Upchurch was aware this could result in serious potential liability to Liberty National. (Upchurch Dep., pp. 31-32).

Specifically, Mr. Upchurch can only recall contacting Mr. Bill Barcliff, general counsel of Liberty National, and discussing Mr. Stewart's statements. (Upchurch Dep., p. 32). Mr. Barcliff reported to Mr. Upchurch that the comparison chart had been generated in a district office and was not authorized or approved by the home office, and,

according to Mr. Barcliff, the chart was not widely used. (Upchurch Dep., p. 32). Based on his conversations with Mr. Barcliff, Mr. Upchurch determined that Mr. Stewart's allegations were meritless. (Upchurch Dep., p. 34). After concluding that the allegations were meritless, Mr. Upchurch directed the district office to discontinue using the comparison chart, and closed the matter. (Upchurch Dep., p. 33).

Mr. Upchurch reported Mr. Stewart's allegations to Mr. Ritchie and Mr. Rotenstreich and informed them of the steps he had taken. (Upchurch Dep., pp. 37-39). Furthermore, Mr. Upchurch reported Mr. Stewart's letter and allegations to Torchmark's Board of Directors. (Upchurch Dep., p. 40). Mr. Upchurch states that he made the Board of Directors aware of Mr. Stewart's allegations no earlier than the filing of the amended complaint in the *Robertson* action. (Upchurch Dep., p. 40).

Mr. Hudson, President and CEO of Liberty National, as well as an officer and board member of Torchmark, learned of the Mr. Stewart's complaint in 1990 (Hudson Dep., p. 40). However, as an officer and board member of Torchmark, he did not even bother to obtain and review copies of the correspondence from Mr. Stewart to Torchmark's general counsel, wherein Mr. Stewart expressed concern that there might be massive fraud occurring in connection with the CPEP (Hudson Dep., p. 40; Stewart trial transcript and exhibits). Moreover, Mr. Hudson did nothing in response to the concerns expressed by Mr. Stewart, a past president of Liberty National (Hudson Dep., p. 40).

Yetta Samford testified that in approximately 1990 the Torchmark Board was made aware of the filing of lawsuits against Liberty National and Torchmark involving the cancer exchange program. (Y. Samford Dep., p. 20). Yetta Samford recalled that Sam Upchurch, general counsel of Torchmark, explained the nature of the lawsuits to the Torchmark Board. (*Id.*)

Torchmark's status as Liberty National's parent corporation does not abrogate its responsibility in this matter. A recent Alabama Supreme Court decision makes clear that a parent corporation can be held accountable if it voluntarily undertakes a duty in connection with its subsidiary's business. In *Proctor & Gamble Co. v. Staples*, 551 So. 2d 949 (Ala. 1989), Proctor & Gamble, the sole shareholder in Plaintiff's decedent's employer, conducted inspections of the employer's (subsidiary's) premises. The court determined that Proctor & Gamble "undertook to identify and eliminate safety hazards, [but] . . . failed to comply with [the set guidelines] during the inspection one month prior to the death of the Plaintiff's decedent." *Id.* at 955. The opinion held that "there was evidence that the inspections were negligently performed" by the parent corporation and "that the negligent inspection claim was properly submitted to the jury." *Id.* at 951.

Like Proctor & Gamble, Torchmark voluntarily undertook a duty in connection with its subsidiary's business (i.e. to investigate an accusation of fraud). Also, like Proctor & Gamble, Torchmark negligently performed its duty. When Torchmark undertook to investigate complaints concerning the CPEP, it had a duty to conduct the investigation reasonably much like Proctor & Gamble had

a duty to comply with its guidelines in conducting its inspection.

A second applicable case, *Miller v. Bristol Myers Co.*, 485 N.W.2d 31 (Wis. 1992), analyzes the parent-subsidary relationship in light of the "good samaritan" rule found in Restatement (Second) Torts § 324A (1965). It should be noted that § 324A states the law of Alabama. *King v. National Spa and Pool Inst., Inc.*, 570 So. 2d 612, 614 (Ala. 1990). Section 324A reads as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

*Miller* holds that a "parent corporation assumes a duty of care to employees of its subsidiary where it is found that parent corporation (1) undertook to render services, (2) to the subsidiary, (3) which the parent corporation should have recognized were necessary for the protection of the subsidiary's employees." *Id.* at 40. Based on § 324A, the *Miller* court set forth the test for parent corporation liability in this area as follows:

[t]he parent corporation is liable to its subsidiary's employee if the parent corporation failed



to exercise reasonable care to perform its undertaking and, (a) the parent corporation's failure to exercise reasonable care increased the risk of harm to the employee and such increase was a cause of the employee's injuries, (b) the parent corporation failed to exercise reasonable care in performing the assumed duty and such unreasonable performance was a cause of the employee's injuries, or (c) the subsidiary or the employee relied upon the parent corporation's undertaking such that they lessened, omitted, neglected, or otherwise altered their safety related practices and such alteration was a cause of the employee's injuries.

*Id.* A parent corporation's voluntarily assumed duties can run to the "consumers" of the subsidiary as well as the employees. See Blumberg, *The Law of Corporate Groups* § 14.05.1 (1987). Here, the parent corporation, Torchmark, voluntarily assumed a duty in regard to the investigation of Mr. Stewart's complaint. Torchmark knew or should have known that a thorough investigation was necessary for the protection of the affected policyholders; therefore, Torchmark had a duty to perform the investigation with reasonable care. See *Proctor & Gamble Co. v. Staples*, 551 So. 2d at 949. The evidence to date is sufficient to establish Torchmark's exposure to liability directly based upon its failure to properly investigate Mr. Stewart's complaint.

**D. Torchmark's assets are relevant to consideration of the fairness of any proposed settlement.**

The evidence available to date highlights the importance of considering Torchmark's assets with respect to

any proposed settlement. Torchmark's insurance subsidiaries are required to file statutory financial statements with state regulatory agencies. These statements are prepared according to accounting principles which differ from generally accepted accounting principles (GAAP). (1992 Torchmark Annual Report, p. 34, a copy of which is attached hereto as Exhibit E). For the year ending December 31, 1992 the statutory shareholder's equity of the Torchmark Insurance subsidiaries was a little over 595 million dollars. By contrast, the GAAP shareholder's equity for the year ending December 31, 1992 of the Torchmark insurance subsidiaries was a little over 1.1 billion dollars. (*Id.*) For the year ending December 31, 1992 Liberty National's statutory shareholder's equity was 326 million dollars. (*Liberty National 1993 Annual Statement*, a copy of which is attached hereto as Exhibit F). Assuming the same approximate two to one ratio between the statutory shareholder's [sic] equity of the Torchmark subsidiaries to the GAAP shareholder's equity of the Torchmark subsidiaries, the GAAP shareholders equity of Liberty National would be in excess of 650 million dollars.

In addition, each individual director of Torchmark (and they bear responsibility individually) has the assets of Torchmark available to him with which to satisfy any judgment that may be rendered against an individual board member. The Corporation is obliged to indemnify every director and officer of the company. (See Board of Directors Manual, Exhibit T2).



### CONCLUSION

Torchmark so controlled the activities of Liberty National that the two corporations should be regarded as one and the same. Moreover, Torchmark itself has direct liability for the CPEP based upon its supervision of the Liberty National officers and employees, its knowledge of the CPEP and its failure to set up any policy or procedure to serve as a check against a fraudulent scheme in the course of the policy exchanges. Torchmark certainly is responsible for its own negligent conduct in this regard.

Torchmark is also responsible for its negligent failure to investigate after receiving notice of an allegation of massive fraud in connection with the CPEP. To this date, there is no evidence that Torchmark has taken any action to stop the fraudulent exchange of cancer policies. Moreover, only limited discovery has been conducted against Torchmark to date and further discovery possibly could reveal other theories, such as agency, upon which Torchmark has exposure to liability in regard to the CPEP. The bottom line is that Torchmark is exposed to liability in connection with the CPEP and should not be released without appropriate payment by it.

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by mailing the same by United States mail properly  
addressed and first class postage prepaid.

/s/ M. Kathleen Miller

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\* \* \*

[p. 847] I'll see you tomorrow.

MS. MILLER: This won't take but one second.

THE COURT: That is one second too long. I'll see y'all in the morning.

(THEREUPON, court stood adjourned at the hour of 4:40 p.m.)

MORNING SESSION - THURSDAY,  
MAY 19, 1994 - 9:00 A.M.

WHEREUPON, the following proceedings were had and entered of record as follows, to-wit:

MR. ROEDDER: The first thing is the basic set of objections - It is paragraph number one, Judge that we filed as objectors to the fairness of the settlement and the certification of the class. We listed, in accordance with your Honor's earlier orders on October 8th, all our objections to the proceedings, and that is what number one is. I don't think there is anything further to be submitted in support of it. It is just for your Honor to rule upon.

MR. PENNINGTON: And, your Honor, for the record, we oppose the motion, and I apologize to the court but I haven't received a service copy of this yet. I didn't know I would be involved.

THE COURT: Okay. If I grant that motion the whole case is gone? Is that what it means?

MR. PENNINGTON: That is what it amounts to.

[p. 848] THE COURT: Let me go ahead and deny that one.

MR. ROEDDER: Number two is after we had our hearing in January Mike filed a rebuttal - what we call a rebuttal affidavit of Mr. McWhorter, their actuary, and our position is that that affidavit ought to be struck. Our position is that affidavit comes too late. We didn't have a chance to cross-examine him about the matters that are raised in the affidavit, it is hearsay, the matters that are in the affidavit are speculative and conjectural. We have listed all our objections in the pleadings that we filed.

THE COURT: The affidavit he filed subsequent to the Fairness Hearing?

MR. ROEDDER: Yes, sir.

MR. PENNINGTON: Your Honor, if you remember, you gave everybody an opportunity to submit objections up until I think it was the Wednesday after the Fairness Hearing, and they filed affidavits on their side, we filed a rebuttal affidavit on our side, and certain things that had been said at the Fairness Hearing. And our position is what is good for the goose is good for the gander. If they were entitled to file affidavits up through Wednesday so were we.

THE COURT: Well, certainly.

MR. ROEDDER: I don't remember - and, I may [p. 849] just not remember correctly, but I don't remember Liberty having permission to file an affidavit on behalf of Mr. McWhorter. He was here for trial, and -

THE COURT: Well, certainly -- I certainly didn't grant specific permission, but I think if one side could file affidavits the other side certainly could.

MR. ROEDDER: Did we file? Did we file affidavits after the January hearing? I know we filed some things that came up in the course of the hearing, but I don't think we filed any affidavits, and I don't think we asked for permission, but the record will speak for itself on that.

THE COURT: We will just let the record show that. If both sides filed affidavits, all of them are admitted. If one side filed them then the motion to strike them is granted. How about that?

MR. ROEDDER: All right, sir. Number 3 --

THE COURT: You've got a -- who is Moyse? Is that your-all's man?

MR. ROEDDER: Yes, sir.

THE COURT: You filed that affidavit with Betty Ann Eckels. Who is that?

MR. PENNINGTON: That is an objector, your Honor.

THE COURT: That is an affidavit that was filed [p. 850] subsequent. So, submission of seven affidavits in opposition to Defendant's Motion to Strike Late Objections, whatever that is.

MR. ROEDDER: Judge, I may be wrong, because I, frankly, don't recall specifically right now, and I don't want to misstate anything, but I think the things

we filed after the hearing were specifically, you know, allowed by your Honor without any kind of a blanket filing; but, I think we had permission to file exactly what we did file, nothing more and nothing less. But I, frankly, don't recall, and I haven't looked back at the record.

MR. WILSON: I really think because of the length of the hearing that you let everybody have the right to supplement to cut down on the necessity of calling additional witnesses, and things of that type. But, I thought it was a blanket --

MR. PENNINGTON: I did too.

THE COURT: Well, you know, I let them file everything, but this would be different because he did testify. I told them to submit affidavits of objectors rather than put the objectors on the stand.

MR. PENNINGTON: This affidavit, your Honor, addressed certain questions that I think you wanted to address at the hearing, that that was the purpose of it. It was contemplated at the hearing that there needed to be [p. 851] some testimony on these things. I think it came up at the hearing. That is why we filed that affidavit; but, as you see, they filed a whole host of stuff.

THE COURT: I made the ruling. I think it is the same -- if one person filed an affidavit, then everybody has a right to.

MR. PENNINGTON: Then that motion will be overruled because you already pointed out there were affidavits filed by the objectors on that same day?

MR. GEWIN: By class counsel.

MR. PENNINGTON: Class counsel, and the objectors filed affidavits that day and so did we.

THE COURT: You filed some on February 7, didn't you? Notice of filing affidavits shows on -

MR. ROEDDER: (Interposing) Yes, sir, but, again, my recollection may be wrong, but I think whatever we filed we had express permission to file.

THE COURT: Well, the record will show that, if it makes any difference.

MR. PENNINGTON: Well, your Honor, my only concern is we had a lot of conversations off the record about that sort of stuff too, and I just think that, you know, you can give it whatever weight it is entitled to.

THE COURT: Well, it is in the file. I'm not going to take it out of the file.

[p. 852] MR. PENNINGTON: Thank you, your Honor.

MR. ROEDDER: I'm not sure where we are on number two, then. At any rate, it is there for your Honor to do with whatever your Honor wishes.

THE COURT: Okay.

MR. ROEDDER: Number 3, your Honor asked us at the hearing to file objections to the documentary evidence, as you recall, that came in or that was submitted after the hearing. And we filed on January 26th objections in the form of a letter to your Honor where we objected to various materials that had been submitted by

Liberty National. Again, I don't think this needs reargument, and I think the letter is self-explanatory.

THE COURT: Okay.

MR. ROEDDER: It is January 16, 1994. It is just something that your Honor needs to look at and rule as you will.

THE COURT: All right.

MR. ROEDDER: Paragraph number 4, in the motion that we are looking at -

MR. PENNINGTON: For the record, your Honor, we submit that Item Number 3 should be overruled to. Our position all along was the best thing for the court to do was take all the evidence offered and give it whatever weight it was entitled to rather than taking and choosing.

[p. 853] MR. ROEDDER: We think certain evidence was admissible, but it is for your Honor to rule.

Number 4 is something that might need a little argument. We had a client, Ms. Walton, who was diagnosed with cancer, and we were advised of that in January after the hearing had occurred. Under the terms of the settlement as then proposed, she would not get anything like the other cancer victims would. She would not be treated equally with them because her diagnosis happened to come later than June 16th, 1993.

THE COURT: Didn't we talk about that at the time you filed -

MR. PENNINGTON: (Interposing) Your Honor that was mooted by the February 4th order, which I think



took reformation back to June 16th, which means if this settlement is approved and affirmed she gets the reformed coverage. Now, what he is saying, she doesn't get to share in the monetary pools, and that is right; but, we have got to have a cutoff sometime. We are going to have the same situation to crop up if this case is appealed. It is going to happen to them too. You have got to have a cutoff date.

MR. ROEDDER: Not only does she not get to share in the monetary pools, both of them, she does not get restitution either; so, these claims that are being submitted while this thing is pending on appeal or [p. 854] whatever, will be paid, presumably, under her current policy, the new policy that is supposed to be better.

MR. PENNINGTON: As reformed.

MR. ROEDDER: I understand the reformed policy won't be effective as of June 16th, 1993, maybe I misunderstood. I understood that payments were not going to be made under that until everything was done on appeal.

MR. PENNINGTON: I think that is right.

MR. ROEDDER: Okay. So, until a year or two or three from now when this thing is done on appeal, she is going to be submitting claims that will be paid only in part because the new policy doesn't pay -

THE COURT: Who is going to appeal it? Y'all going to appeal it?

MR. PENNINGTON: No, huh-uh.

THE COURT: Y'all going to appeal it, Bill? If you're going to appeal it -

MR. ROEDDER: I'm saying she is in an unenviable position of not being entitled to the same thing the other cancer patients get.

THE COURT: Well, you know, there has got to be a cutoff sometime. You know, you can't keep letting it go.

MR. ROEDDER: Anyway, that is number 4. I guess that is denied?

THE COURT: Yes, I think so.

[p. 855] MR. ROEDDER: All right. Number five, we have moved to strike again. This was a supplemental affidavit. It is similar to the one by Mr. McWhorter that what he talked about under paragraph number two that was submitted after the fact. And, again, we filed objections to that on January 27th, 1994. Those are there for your Honor to rule on. I'm assuming you would do as you did on number 2?

THE COURT: I'm going to look at those again and go back and see what we did and try to remember what we did, look at my notes and see.

MR. ROEDDER: And number one, those objections are just to clean up, those are overruled, right, the basic objections to the certifications?

THE COURT: Yes.

MR. ROEDDER: All right, sir. Number five that we have just talked about, that is under consideration.

Number six, Liberty National filed after the hearing a motion to recharacterize the class so it could be certified on a separate independent basis that was not the subject of any discovery for any trial evidence. And we object to their moving after the fact to recharacterize what they want in the way of a class action.

MR. PENNINGTON: Your Honor, that would be the B-one business, the whole Fairness Hearing was about B-one and limited funds, and your order of February 4 has already [p, 856] overruled that motion explicitly.

THE COURT: All right.

MR. ROEDDER: I want to make clear, and I understand your Honor is denying February 6 -

THE COURT: (Interposing) Yes, I'll deny it.

MR. ROEDDER: That was not an issue at trial. It is our position that the issues raised by this pleading filed after the fact were not issues that were tried or discovered. That is our position, and I know Mike disagrees, your Honor, -

MR. PENNINGTON: (Interposing) My position is that the issue certainly was raised, and, if nothing else, our motion was to conform to the evidence actually presented at the Fairness Hearing.

MR. ROEDDER: We disagree to all that. Number 6 is denied?

THE COURT: Right.

MR. ROEDDER: Number 7. This one may need a little discussion. We filed a motion asking that certain

claims not been considered within the class, and if your Honor wants us to just file suits and have a court in some other place to decide whether they are or not, that is fine; but, basically, what we are dealing with here, is what is called Liberty National supplemental policy. It does not have any benefits that are at issue in this case. [p. 857] It doesn't have chemotherapy, it doesn't have radiation, it doesn't have prescription drugs, it is not that kind of a cancer policy, it is a different kind of cancer policy.

That cancer policy - a supplemental policy provides, and the basic underlying policy that the supplement provides, is that Liberty won't pay except under one. And, so, they are taking the premiums for two policies, one being the supplemental policy. It doesn't have anything to do with these cancer claims. They are charging a premium for that when they are also selling at the same time another policy basic cancer policy that says they won't pay under both, they will only pay under one. We think that is a separate independent fraud involving a separate different policy. It is a cancer policy, but it doesn't have anything to do with chemo- or radiation. We have got clients that suffered that kind of -

THE COURT: (Interposing) Nothing to do with the switching?

MR. PENNINGTON: It does have everything to do with the switching. What happened is that there was an old - a number of different old policies. This supplement did not have radiation and chemo- in it, but it increased the daily benefits for hospitalization by a few dollars here and there, and gave expenses in those categories. Some [p. 858] people with old policies had an old

policy and a cancer supplement. When the switch occurred some people kept that supplement and some people didn't.

This argument that they are not going to get benefits under both if they kept it is crazy, because there has never been anybody denied benefits under the cancer supplement policy on that basis, but this is part and parcel of the switch. Most of these claims that they have filed, and the objections they have filed are to say, "I was fraudulently induced at the time of my switch not only to switch to the new policy but also to drop my cancer supplement. It is part of the same transaction. It is involved in the exchange, it is part of an exchange, and it is covered by the release in the settlement. And this settlement is a very broad settlement. It provides a lot of relief to the class. And, for us to have to provide relief to everybody in this case and then still be subject to punitive damages claims or any other claims from somebody who is going to hold their mouth a little bit different, and call it a different claim, is just not right. That is not what the settlement is about, and I think the release ought to be enforced the way it is. You have an injunction in place against filing lawsuits in separate courts. A permanent injunction is part of the relief, and I don't think it is right to ask them to file [p. 859] their suits in separate courts and let another judge decide in light of your injunction. I think the right way to do it is to come to you with an evidentiary record and let you rule if it is covered by the injunction.

THE COURT: In other words, you don't want me to rule the rest of my judicial life?

MR. PENNINGTON: No. I think there are too many variations of this, and I think if you overrule this objection you have ruled.

MR. ROEDDER: Very briefly in response.

This doesn't have anything to do to be real clear, it doesn't have anything to do with whether somebody got switched or not. It really doesn't. If somebody was sold a supplement policy on top of any other cancer policy that Liberty issued without ever getting switched from anything to anything, they only got coverage under one of those two. They had to take their choice. Nobody has ever been denied that. This policy says, "If a covered person" – and this is the basic policy that you might have a supplement to – "If a covered person is also under another cancer policy issued by us," and that would be the supplemental policy, "only one policy chosen by you will be effective." I mean, I don't know whether they have ever tried to enforce that or not.

THE COURT: In other words, we are arguing [p. 860] something that we don't have a case about?

MR. ROEDDER: No, sir. I have clients who have been sold a useless policy. They bought a supplement policy – a number of clients have been sold a useless policy. It doesn't have anything to do with whether they have switched, and I want to pursue those fraud claims for selling my folks a useless policy and charging them premiums when they knew full well only one policy would pay and they sold them two.



MR. WILSON: Judge, if what Bill says is correct, I don't think it would be covered by the release. If what Mike says is correct, I think it is hearsay.

THE COURT: Well, you show me an order that says that.

MR. WILSON: That is the question on the table. How is it going to be determined in the future? If I'm hearing Bill, he is saying that these people had a fraud claim even if there had never been a cancer exchange program, because he is saying they already had a supplemental policy and a cancer policy before the idea of an exchange program ever came about. If that is the case, that is, obviously, not to be covered by this.

THE COURT: What is fraud?

MR. ROEDDER: The fraud is selling a person two policies and charging them separate premiums when they [p. 861] know full well only one policy will pay.

THE COURT: If it is in the language of the policy don't they have to tell them it will pay before you have a fraud?

MR. ROEDDER: No, sir, I don't think so. I think if they come in and they do not disclose -

THE COURT: In addition to the written policy?

MR. ROEDDER: Yes, sir.

THE COURT: They just have to come up and tell you, "Now, this ain't going to be paid"?

MR. ROEDDER: Well, that is getting to the merits of the fraud case. Not whether I can file it or not; but, yes, sir, that is what I believe.

MR. PENNINGTON: Your Honor, the cancer supplement policy is not the same thing as a cancer policy. We say you can have two cancer policies at the time same, we don't say you can't have a cancer policy and cancer supplement policy. That is the difference. He is trying to say a cancer policy supplement policy is the same thing as a cancer policy. He is arguing the merits of the -

MR. ROEDDER: (Interposing) It is not.

MR. PENNINGTON: I just want the record to be clear we have never denied benefits under a cancer supplement policy on the grounds that a person with a cancer policy and a cancer supplement policy had two cancer [p. 862] policies.

MR. GEWIN: Never. Never.

THE COURT: Y'all are saying that the cancer policy and the cancer supplement policy are different policies, but the language in there means a cancer policy or a cancer supplement policy is not a policy under the terms of -

MR. PENNINGTON: (Interposing) That is exactly right.

MR. GEWIN: And there was discovery on that question in this case.

MR. ROEDDER: Let them tell that to a jury. Let me pursue my own fraud claim that doesn't have anything to do with a switch and see what the jury does.

MR. WILSON: It sounds to me like it might be the subject of summary judgment; but, if the guy had a claim before the cancer switch was ever conceived, I don't see how that can be released by this settlement.

MR. ROEDDER: Or after the cancer policy. It doesn't have anything to do with the switch, if he just had two policies. My claims here don't have anything to do with switching. It is just selling two policies when only one would pay.

MR. PENNINGTON: I want to make one more point about this just to be real careful. They are trying to [p. 863] walk a lot of things through any crack they can, and there are a lot of other people making these same kind of motions with the claim, "Look, when my exchange occurred I lapsed my cancer supplement policy, my agent induced me to do that, that was a fraud too," and they want that supposed fraud that occurred exactly in the same transaction as the exchange - as part of the exchange to be accepted too.

THE COURT: Well, the whole thing is, the release is for everything that was involved in the cancer switch policy.

MR. PENNINGTON: That is right.

THE COURT: If it wasn't involved in it, it is out of it; if it wasn't involved in it, it is in there.

MR. ROEDDER: May I take it that your Honor would grant this particular motion insofar as it does not relate to an underlying cancer switch?

THE COURT: As long as it does not relate to the cancer switch, certainly. That is the only thing that is the subject of the lawsuit.

MR. PENNINGTON: Well, your Honor, there are a couple of other categories of the release, just to make sure the record is clear, and it doesn't apply to this, but we do have in the release the failure to offer somebody with an old policy an opportunity to exchange. That claim is released, and any transaction that results in the [p. 864] issuance of a new policy to somebody with an old policy, that is released. And that is there so you can't say, "Well, this wasn't" -

THE COURT: (Interposing) Well, if it is in there it is in there. If it is not in there, it isn't there. If it doesn't have anything to do with the switch, then, you know, we will have to deal with that on an individual basis regardless of whether I deal with it or somebody else deals with it. Right?

MR. PENNINGTON: That is right.

MR. ROEDDER: All right, sir.

I'll move on to paragraph 8. I think we have got a ruling on paragraph 7. It is my understanding that the relief that I sought in that particular paragraph is granted to the extent that my fraud claims that I want to assert do not rest on a switch from one cancer policy to another.

MR. PENNINGTON: I object to the way he characterized it, because -

THE COURT: (Interposing) If it has nothing to do with the cancer exchange policy or the cancer exchange, then it is not in the settlement. If it is it is out, you know. We will have to take each individual case on each individual fact to see, I guess. That is the only way I know to determine that.

[p. 865] MR. ROEDDER: All right, sir. I'll move on to paragraph 8.

THE COURT: All right.

MR. ROEDDER: I don't think this one needs any additional argument. It is basically where we had come in after the initial settlement in June, and after your Honor had issued an injunction, and we filed objections to the certification of the classes, and the issuance of the injunction without hearing various other matters. And, that is a matter to be ruled upon by your Honor.

MR. PENNINGTON: That has been implicitly overruled by your Honor already.

MR. ROEDDER: So that motion is denied?

THE COURT: Yes.

MR. ROEDDER: All right. In paragraph 9, it goes back - again, this is more of a clean-up matter. It goes back to the original motion to intervene that we filed in the intervention petition, and the amendments of those petitions were - again, we object to the certification and the settlement, lack of discovery, those things that we have been fussing about throughout, and I'm assuming that matter has been denied too?

THE COURT: Yeah.

MR. ROEDDER: Number 10, is our - again, I don't think this needs much argument, but we filed [p. 866] objections to the notice that Liberty National sent out on a whole bunch of grounds.

THE COURT: Well, that was taken up in the hearing too wasn't it?

MR. ROEDDER: Yes, sir.

THE COURT: That will be covered in my order. There was an order on the Fairness Hearing

MR. ROEDDER: All right, sir. Well, if the notice is going to stand, this paragraph 10 will be denied. If your Honor wants to wait to rule on that, then -

THE COURT: (Interposing) I'm going to rule on that in the order because that is all part of it.

MR. ROEDDER: I'll mark 10 is under consideration and will be known later.

Number 11, we have - again, this is another clean-up matter. We had objected to the protective order that was issued with regard to the documents that Liberty produced. I think, your Honor probably has, at least, implicitly maybe overruled those, but I assume those objections are overruled?

THE COURT: Yes, sir.

MR. ROEDDER: Number 12 is an objection to some of the testimony at trial. Mr. Moyse testified as their expert regarding the fairness of the proposed settlement. We objected at the time. We didn't think he was qualified [p. 867] to so testify. It went to the ultimate issue. We



asserted a number of grounds for our objections at that time, and we reassert those now.

THE COURT: Well, you had a ruling on them at the time didn't you?

MR. ROEDDER: No, sir. I think your Honor wanted us to wait and rule on everything after the matter was heard and all our objections were submitted; so, I think technically it is awaiting ruling now.

THE COURT: Okay. Denied.

MR. ROEDDER: And the objection is overruled.

Number 13 is something - I don't know if you want to take that up right now. It has to do with class counsel's motion to modify the court's order, and there were two things, as I recall, that Frank and Jere wanted. One was to tighten up the release language in the settlement -

THE COURT: (Interposing) Well, we will let Frank and Jere argue their motions.

MR. ROEDDER: We filed an identical motion.

THE COURT: Okay.

MR. ROEDDER: And we also want that.

And, to the very same extent, no more no less, what they want, and, also, they wanted I think to release - not to release Torchmark, and we want Torchmark [p. 868] not to be released; but, that's what we have been doing discovery on. I think your Honor, maybe, wants to hear on that, but we have submitted briefs and we are prepared to argue 13 and 14. One is class counsel's motion and one is ours.

THE COURT: Okay. That is the motion that the main part of it is not to release Torchmark? Is that what it's talking about?

MR. ROEDDER: That's right. You want us to hold up on that?

THE COURT: Just hold up on that.

MR. ROEDDER: All right, sir. Number 15 is another objection to a protective order that we filed when Torchmark produced documents. That is the same sort of thing. I assume that is overruled as well?

THE COURT: Yes.

MR. ROEDDER: All right, sir. I think that concludes everything that I have, and I think with each paragraph we have now got a definitive answer, either it is overruled, denied, or under consideration. And I appreciate your Honor's patience with me.

THE COURT: Okay.

MR. WALDROP: Your Honor, we have filed a motion that was in regard to two specific cases, this one is Gussy Johnson and Swillies [sic].

[p. 869] Your Honor, we had filed this and attached a copy of a proposed complaint. What this deals with, both the Swillies and the Johnsons had been sold - the best way I know is to show your Honor, they are a family, and they have been sold a cancer policy, and they had also been sold a single parent cancer policy. Our position in both of these two situations are that what they should have been sold was a one-family policy, not an individual cancer policy in a single-parent cancer policy, because

when you put these together, obviously, the premiums are greater than a family policy. The purpose of the agent doing this, we believe, was simply to make more of a commission. And that is what our lawsuit – we want filed on behalf of both of them. Now, it gets more complicated, but in no way – the reason we attached the copy of the complaint, your Honor, we are not claiming that the old policy is better than the new policy or the new policy is better than the old policy, we are just simply saying in these two situations, is that the agent and the company was cheating the family because they ended up selling them a single-parent policy in an individual policy as opposed to a one-family policy. So, it doesn't have anything to do with whether radiation benefits and drugs outside the hospital –

THE COURT: (Interposing) The switch, okay. It [p. 870] has nothing to do with the switch –

MR. WALDROP: Yes. We are not making any claims. So, what I say then it dovetails into the situation that Bill Roedder just brought up about the release. And the reason I presented this to your Honor this way, because I didn't want to just haul off down to Mobile and file a lawsuit down in Mobile and somebody make a contention that Kathy and Norman filed this suit down there and somehow it infringed upon the injunction. I didn't want to do that. But, I don't believe this is what anybody intended this case to be about. In other words, this is a separate fraud.

MR. PENNINGTON: Your Honor, I have served yesterday by fax on Ms. Miller a copy of the affidavit that I intend to file with the clerk setting this out today, but

basically what the situation is, is this with Gussy and Willie Johnson:

Husband and wife have an old family policy, husband and wife switched to a new family policy; wife gets cancer. In 1990 there is another exchange to the new 1990 policy; wife is not eligible to exchange to the 1990 policy because she has had cancer.

THE COURT: So, they were switched to a new policy and when she got cancer they switched them again?

MR. PENNINGTON: Right. And that is – because [p. 871] she was not eligible they wound up with two policies. That is exactly what happened. That is – their records – I talked to them all week about this, that is what my records show.

THE COURT: All right.

MR. PENNINGTON: And, it is clear that –

THE COURT: If what you are saying is right it is in, you can't file suit; if what you say is right, it is out and you can file suit. How am I going to know which one is right?

MR. PENNINGTON: I think the records are clear. I don't think they are going to dispute what I just said. If they are, they are going to have a hard time showing it, because the records are absolutely clear they were issued those policies. The records are absolutely clear when she got cancer and the records are absolutely clear after she had cancer that is when they wound up with the individual policy.

THE COURT: If it is as clear as you say it is my ruling is going to be clear as a bell, you can't file it. The injunction covers it.

MS. MILLER: Your Honor, the problem is, and the Johnsons will testify that -

THE COURT: (Interposing) Every time Frank gets up he wants to tell me I'm wrong. If I'm right he'll [p. 872] sit down.

MR. WILSON: No, I was going to say that the question on the table is who is going to decide that, because, I feel as class counsel that the description of the claim that Norman has given would clearly not be intended to be -

THE COURT: (Interposing) No question about that.

MR. WILSON: By the same token, if it all arose as a part of that switch there is no doubt it is intended to be covered by the release.

THE COURT: That is what I say.

MR. WILSON: That is why I'm saying to the court I think the question on the table is, and this is something that Norman has put before you today, but that issue is going to come up three years from now, and the tough question I think that is really on the table is who is that going to be who is going to decide when and how, where, who is right, and whether it is related.

MR. PENNINGTON: Your Honor, part of the settlement is your injunction, and that I think means that you or some combination of you and a special master will

have to decide that question. And, I don't know any other way -

THE COURT: (Interposing) How am I going to [p. 873] decide it if I don't have anything other than just what y'all say?

MR. PENNINGTON: I think the right way for them to handle it is for them to file a petition with whatever affidavits they want to file, and we get a chance to respond to it, and you make your ruling on that basis. We all have an opportunity to be heard and take our appeal rights.

THE COURT: I don't know any other way to do it unless you - they file the suit and they come up here and file a rule to show cause, we will just have to come back up here some day anyway.

MR. PENNINGTON: That's right.

MR. WALDROP: Your Honor, my only suggestion about that is, it does place a lawyer in a terrible situation. I mean, I clearly didn't think this was covered, but the more I searched I started worrying about it. That is why I was trying to do the right thing.

THE COURT: Well, the right thing is, if Mike is right, then you can't file it; if you are right, then you can file it. How am I going to decide who is right without you doing discovery?

MR. WALDROP: Well, are you saying that I should file my lawsuit here - up here in this county? I mean, I'm trying to -



[p. 874] THE COURT: (Interposing) Well, maybe you could file a petition with the court to determine whether or not it is covered under the release.

MR. WALDROP: Your Honor, I have filed a motion -

THE COURT: (Interposing) I understand that. It doesn't serve the same purpose, but I have got to decide it based on facts that develop. I can't decide it on the arguments of the lawyers.

MR. WALDROP: Yes, sir.

MR. WILSON: Well, if what Mike is saying is true, it ought to be able to be shown pretty easy, and not too difficult. So, let's use a hypothetical. Suppose the issue comes down to the client of Norman, say, one, two, and three - say white, and the client of Mike says black. Is your Honor going to decide a credibility issue to decide the question of whether or not they can file a lawsuit in the first place?

MR. WALDROP: See, my clients would testify, and the Johnsons would testify, in 1990 - they would say, "That agent came in and said, 'Look, you know you used to only have a single policy here.' " Well, he says in truth that is not true, they have also had a family policy. But, the agent said, "Well, you have always had a single policy, and you know you got cancer, so what we want to do now is [p. 875] so your husband will be covered and your child will be covered, let me sell you this single-parent policy." And they would say, "And if we didn't have coverage and you had cancer and you now can't get a family policy, I guess you're right." He said, "No,

you're right, that is what we have got to have in two policies." All three of the Johnsons - both of the Johnsons will testify to that. So, that is fraud, because the truth of the matter is they should have just had one family policy; but, that doesn't have anything to do with the relative values of the policy or anything else, they just get cheated out of a -

THE COURT: (Interposing) I understand what your argument is.

MR. WALDROP: Yes, sir.

THE COURT: Everybody can make that, but how am I going to decide that if you don't develop some testimony?

MR. PENNINGTON: Your Honor, I think the right way to handle it would be to enter your order on the class general, take these issues up once the appeal goes back on a case-by-case basis.

THE COURT: That is the only way I know to do it. If you have a better suggestion I sure would be willing to hear them.

MR. WILSON: I have one more point -

THE COURT: (Interposing) Y'all excuse me, [p. 876] I have a jury that wants to see me that has been out all night.

(Recess)

THE COURT: All right, we'll go on.

MR. WALDROP: I think in one thing we do have a basic disagreement. You know, just like in any

other case whether there is a release that is pled, most of the time, as far as I'm aware, if you file suit in Conecuh County and somebody thinks it is released, we will go to the trial judge in Conecuh County that looks at it and says -

THE COURT: (Interposing) There is no fraud as long as it is a relief, but if you are talking about the injunction, you have got some penalties if you do something that violates that injunction. That is the problem. If it was just a relief, then we wouldn't have any problem.

MR. PENNINGTON: Your Honor, all of these - first of all, it seems to me that virtually all these kinds of motions about I'm going to hold my mouth a little different and say it is not covered by the class, are mute if this case goes up on appeal and the matter is not affirmed. I certainly don't think that is going to happen, I don't think it is due to happen; but, it seems to me the right thing to do is just reserve ruling on those types of questions until after the appeal is over, because the [p. 877] appeal -

THE COURT: (Interposing) Or time for the appeal has run.

MR. PENNINGTON: Or until time for the appeal has run.

THE COURT: Because the statute - the statute of limitations is tolled, is that correct, until -

MR. WALDROP: (Interposing) As long as it is "stayed". There is a saving provision under the limitation action that says at the time the appeal is taken out, and I would assume, your Honor, that we would agree that

these presently would be covered by the injunction at the moment until your Honor make a decision, am I right?

THE COURT: Right. I don't want to cut off your rights to file suit just because the time is running while this is going on.

MR. WALDROP: Your Honor, just one aspect of this just so we could get one thing straight on the record. One of these involves the wife whose name is Linda Swillie, and I believe that Mike agrees with me that the injunction would not cover her.

MR. PENNINGTON: Linda Swillie had an old policy that did not have unlimited benefits for radiation and chemotherapy, and, therefore, she is not a class member.

[p. 878] MR. WALDROP: So, we would be able to file a lawsuit on behalf of her?

THE COURT: If she is not a member of the class, certainly.

MR. WALDROP: Okay. I just didn't want -. Okay.

Your Honor, the last thing in regards to this, now, would your Honor have to wait until after the end of the appeal to hear, like, for example, this?

MR. PENNINGTON: That is what we just talked about.

THE COURT: I sure hate to make rulings if I don't have something - on something that is going to be moot down the way anyway. I mean, I don't want to

make – I don't want to take up a lot of time ruling on stuff that doesn't make any difference down the road.

MR. PENNINGTON: Thank you, your Honor.

MR. WALDROP: Well, in other words, do I understand what your Honor will do at some point, since he filed an affidavit yesterday in regards to this, that at some point then you will set this, like, our motion down for a hearing?

THE COURT: What I would like to do is let's just go ahead now and see if we can't set a policy for this thing since it is going to [sic] done in the future.

[p. 879] MR. PENNINGTON: If the settlement is approved, and I don't know what you claim to do about that, but if the settlement is approved, if it is appealed or the time for appeal expires, I think the right thing to do is similar to what you have done today.

THE COURT: Well, it could be done in two ways: They could file a suit, y'all can plead the release in that court and file a contempt petition in this court against enjoining or against – for the injunction – violation of the injunction. All right.

MR. PENNINGTON: I suppose that is one way, your Honor.

THE COURT: That would be one way. The other way would be to come to this court first and ask for a declaratory judgment whether or not it is covered in the injunction.

MR. PENNINGTON: I think that is the only way to do it, your Honor, because otherwise we are going

to have that situation I sure don't want to be in again with two judges with possibly different interpretations –.

THE COURT: Well, the judge wherever the suit is filed is going to be limited to the release. He doesn't have anything to do with the injunction.

MR. PENNINGTON: I'll be in here saying, "Your Honor, this suit is enjoined," and you say, "Yes, it is [p. 880] enjoined," and, some judge in some other county may say, "I've interpreted the relief differently, it is not enjoined; the motions to stay is denied," and here we are in another round of mandamus proceedings up in the Alabama –

THE COURT: (Interposing) I don't know how I can stop them, do you?

MR. PENNINGTON: You can stop that by having the procedure come to this court, "file your petition, and if you don't agree with my ruling appeal."

MR. WILSON: You're going to have people that – these gentlemen are not going to, but you're going to have people that don't know the existence of this case, and three years from now or six months from now they file a lawsuit or whatever that don't know about this; but, that is going to happen from time to time, that people are going to file a suit.

THE COURT: That is right.

MR. WALDROP: And, also, you're going to have a situation where you're not going to be really – you know, you're pretty sure it is not covered. I mean, I can think of one or two that I have that I'm pretty sure it is not covered.



THE COURT: That is what we just talked about.

MR. WALDROP: I'm sure - well, you know what [p. 881] I'm saying. This one to me is not covered either until I started hearing how broad he was going to construe the release.

MR. GEWIN: Your Honor, that happens in injunctions all the time, and that is what the courts are for. And we really can't try all the attempts at cession or cession from this settlement or this hearing today. And, I think the only way to do it is, if I'm a lawyer and I know about it and I know about the injunction -

THE COURT: Tell the court -

MR. GEWIN: (Interposing) Judge, here is my petition, here is my evidence. I'm not covered.

THE COURT: I think that is the best course of action for it.

MR. WALDROP: Do I understand, then, on these you're going to set them down at some later date? I just want to make sure. I don't mean to respond to his affidavit that he just filed.

MR. PENNINGTON: I think I would agree with that. He need not respond.

MR. WALDROP: At some other time we will be given a chance to bring our clients up here or whatever we need to do?

THE COURT: We will take whatever discovery is submitted or whatever.

[p. 882] MR. WALDROP: All right.

THE COURT: I don't know any other way to do it.

MR. WALDROP: All right, sir. I was just trying to make sure that we were clear. Two other things just to make sure, I understood these were to be our motions. There was a motion that was filed about a Motion to Strike on the part of the late objectors. I think, your Honor, at the last hearing you said at some point you were going to consider that. Should we - you know, we have got - I didn't know whether you wanted us to maybe file some affidavits on behalf of them and your Honor take them under submission, I didn't know if that was going to be something that may be brought up -?

MR. PENNINGTON: I may be remembering something wrong, Judge, but I thought the ruling was that you were going - submitted objections up through February 20th, the date of the Fairness Hearing, but the cutoff ~~proof~~ of claim forms was still December -

MR. WALDROP: (Interposing) In other words, -

MR. PENNINGTON: That is what I remember.

MR. WALDROP: Okay. Well, as long as we don't have a problem. In other words, your Motion to Strike would be denied?

MR. PENNINGTON: I had understood he had ruled [p. 883] that way.

MR. WALDROP: I was just trying to make sure that I -

THE COURT: (Interposing) Anything filed up to the Fairness Hearing was going to be admitted.

MR. WALDROP: Okay. And, I guess that is the - I guess the last thing, we had filed the motions in regard to attorney's fees, but I guess that is something that your Honor will take up at a much later date.

MR. PENNINGTON: No, I don't think so, your Honor. I don't think - you're asking us to agree to modifications to the settlement put forth in the February 4th order, and I don't think class counsel can agree to those modifications if he is subject to a risk that Norman is going to take "X" dollars of the class's money like Norman has asked for.

MR. WILSON: I must have something.

THE COURT: Oh, boy! Let's talk about taking their money.

MR. WILSON: I heard money, Judge.

MR. PENNINGTON: I know I'm not going to be exposed to any risk to anybody being awarded attorney's fees and accept the settlement. I mean, we have got to have an end to this thing in terms of what the settlement is. And, they are petitioning for attorneys' fees on a [p. 884] common funds basis for a portion of the enhancement set forth in your February 4th order, and I don't see how you can take that up at a later date and not have Frank know what the class - whether the class is going to keep all that benefit or not. And, I know some others have filed petitions, and I have heard noises someone is going to ask me to pay -

THE COURT: (Interposing) I'm going to rule on all those in my order. I'll take any written arguments that you want to submit about attorney's fees, I don't want to

hear any oral argument, but I'll take any written arguments that are filed seven days from today.

MR. WALDROP: Would that mean if we would like to add any affidavits -

THE COURT: (Interposing) Whatever you want to put in.

MR. WALDROP: I just felt like I had to bring that up.

THE COURT: Sure.

MR. WALDROP: Thank you, your Honor.

MR. ROEDDER: Judge, I'm sorry, but I forgot two matters that I gave your Honor earlier, and your Honor may want to take these matters up with the other matter about Torchmark; but, I had filed a motion asking for further discovery - very limited further discovery as [p. 885] regards Torchmark and its responsibilities. I'll address that now or later, whatever your Honor wishes.

THE COURT: I'm not sure what you have filed.

MR. ROEDDER: We have conducted in cooperation with Frank discovery of Torchmark, and I felt at the end of things that we need a little bit further discovery to more fully develop Torchmark's liability. And what I have asked for, and paragraph number 1 is really, to me, the most important thing.

THE COURT: Okay.

MR. ROEDDER: Torchmark has withheld documents and redacted or whited out information in documents on the ground that what was withheld or redacted

was privileged and protected from discovery. They did not provide any kind of a log to give us any kind of a description of subject matter or who wrote it or under what circumstances or when or -

THE COURT: (Interposing) You mean things that they withheld?

MR. ROEDDER: Yes, sir. And, I really think in order to test their claim of privilege we need a log with the information that I have asked for in paragraph one so we can look and satisfy ourselves "it really is" or "I can't tell" "let your Honor look at it" or "it is really not." And we want that produced, and that is paragraph [p. 886] number one. I really think -

MR. PENNINGTON: (Interposing) We did a lot of the description of what we withheld in the responses themselves, all we withheld were litigation reports discussed in pending litigation, and that is it.

MR. ROEDDER: I don't - maybe Frank remembers better than I.

MR. PENNINGTON: We had an agreement, Frank and I, that covered that.

MR. WILSON: Well, that is all you withheld on the claim of privilege, but clearly you redacted the, for example, minutes of the board of directors meeting that dealt with subjects other -

MR. PENNINGTON: (Interposing) But, that is not the issue he is addressing, and I did that pursuant to the agreement.

MR. WILSON: That's right. I think what Bill is saying is, he can't test whether you redacted something that you shouldn't have redacted or not.

MR. PENNINGTON: Well, your Honor, he -

MR. ROEDDER: (Interposing) Your Honor, telling us it is a lawyer's report or a legal report on a legal matter doesn't really get it, because we need who was present -

THE COURT: (Interposing) You are saying that [p. 887] in the minutes of the meeting they redacted some of the minutes -

MR. ROEDDER: Yes, sir.

MR. PENNINGTON: Your Honor, we have - general counsel provides a litigation report to the board of directors. I mean, that is privileged. There is no question that is privileged. I'm not going to show it to Bill. That is why it is privileged.

THE COURT: Okay.

MR. PENNINGTON: And as far as the rest of the stuff -

THE COURT: (Interposing) Okay. Get Tommy Kirk in here.

(THEREUPON, a short break in the proceedings was had.)

THE COURT: All right, let's go on.

MR. ROEDDER: Yes, sir.

THE COURT: Okay.



MR. ROEDDER: We would like a description of the document, its date, the author, to whom it was directed, and the things that we want to ask to see if it is really privileged. For example, if somebody stands up in a board meeting and says – a lawyer, and says, "We got fifteen cases pending, three of them are cancer exchanges and four of them are on other insurance fraud." That is a [p. 888] business kind of thing. I think there is plenty of law to support that that is not privileged, that is not a confidential communication, even though it is a lawyer-client communication. It is not intended to be privileged.

We have got issues in this case regarding when Torchmark knew or should have known about this fraud and done something to stop it. And, those kinds of documents and that kind of information is not privileged, and goes to the heart of when did they know or when they should have known about it.

MR. PENNINGTON: It is a matter of public record when the cancer exchange lawsuits were filed, and that were filed – Frank was among the first. There was a couple of little things prior to that, but that has all been gone through in the depositions. None of that has anything to do with what is really going on here, is they want to see what other kind of other lawsuits they can drum up by getting their hands through to the top.

MR. ROEDDER: (Interposing) That is not right. That is all baloney.

MR. WILSON: That is to decide the issue, but it might be a legitimate reason to look at it; but, it is really not germane here. But, still, there is two parts of it. There are things that were not provided.

[p. 889] THE COURT: Just a minute. Y'all excuse me a minute.

(THEREUPON, a short recess was had.)

THE COURT: All right.

MR. WILSON: The way I understood the production was, there is information, for example, in the minutes that had nothing to do with this lawsuit and nothing to do with the issues that are involved here, and it is an irrelevant question or discoverability question. I do not understand that everything that was redacted from those minutes is privileged.

MR. PENNINGTON: No, not by any means. I mean, you had discussions with potential mergers, potential acquisitions, and Frank and I agree –

MR. WILSON: (Interposing) What was going on in another city –

MR. PENNINGTON: (Interposing) And Frank and I agreed that all that stuff could be redacted, everything that was within the scope of what he asked for was put down there unless it was privileged, if it was privileged I put a little stamp on it. And the only thing that was privileged was the discussions of pending litigation.

MR. GEWIN: Judge, we developed a voluminous record on this issue. This is a fairly straight-forward and simple issue. The state court has a stack of [p. 890] depositions there. During those depositions you can look from the beginning to the end, there was no reservation in the record about, "We want to get some more documents; we reserve our right for more documents to be produced to conclude this deposition." They didn't come

back to the court. This is an action for the 23rd hour, just to delay this thing and drag it out. If the Court has any questions about it, the court can look at the depositions. If the court has any questions – the slightest question as to whether or not you have enough information to rule on that issue you can –

THE COURT: (Interposing) Do you have a list of the documents they withheld, Mr. Roedder, that you want –

MR. ROEDDER: (Interposing) No, sir. I never received such a list.

MR. PENNINGTON: And, your Honor, we have another problem. If we were to be ordered to give him a privileged log, then we are looking at another 30, 40 days before we can do it, because they didn't copy all the documents that was produced. We put a bunch of stuff in a room for them. They copied what they wanted, which was not everything we produced. We have got to go back and get those documents together again, and, then, from that determine what was withheld as privileged.

[p. 891] MR. ROEDDER: I don't know how long it is going to take them or what the logistics are, but I do know that we asked for these documents. They were withheld or redacted with a claim of privilege, and we were provided insufficient information about them to challenge the privilege, and I really think if there is any injury for the Torchmark liability it is in those documents. They are being withheld as privileged. And, then, I'm not saying they have to produce the documents themselves,

they need to tell us about them so we can know that they really are the –

MR. GEWIN: Judge, I think it comes far too late. They should have raised that before these depositions, they should have raised it during the depositions, or at some time prior to this final hearing on this matter. We went to all the trouble to get those documents. Plaintiff counsel reviewed them, the depositions went forward, there was no reservation in any of the depositions that I found about more documents. They asked the president of the company, the chairman of the board. They asked for certain questions on everything related to the two companies and what knowledge was known, and when they knew it, and what reports you had. All of that was gone into in detail. At no time did I hear in any deposition that I attended, "Wait a minute, we need to get [p. 892] more documents before we can complete this deposition."

MR. PENNINGTON: Well, not only that, your Honor, but Frank and I had a specific agreement that the way we did it was the way that we were going to do it back in March. If this issue was going to be raised, it should have been raised then, not now. We had a specific agreement that I would redact it, that I wouldn't produce a log of it, and here is what we were going to do, and we were going forward. I feel like Frank is satisfied with what we did. I asked him if he was, he said he was.

MR. DODSON: Your Honor, would you give Frank and Mike an opportunity later on this morning to talk about these documents and the agreements they had before you rule on this matter?

THE COURT: Sure.

MR. WILSON: I do want to say this, that what all I said has already been quoted, but I think you will find that my response, and the agreement made by discovery says that they will identify in some fashion the - I did not ask for the things that Bill was asking for, they were identifying in some fashion the privilege.

Unless I'm misunderstanding I'm satisfied with what they produced, and I understand the only privileged documents that have been withheld are the reports made to the board of directors by general counsel [p. 893] as to pending lawsuits. And, I don't challenge - I don't, and I don't mean to speak for Bill. I don't challenge the privilege on that aspect of it.

THE COURT: Mr. Pennington, you looked at all the documents?

MR. PENNINGTON: I looked at every document that -

THE COURT: (Interposing) And you're telling the court the only thing that has been withheld are what?

MR. PENNINGTON: The minutes were redacted to eliminate things that dealt with a subsidiary other than Liberty National, matters other than cancer policies with Liberty National first of all. That was by agreement. Any reports on pending litigation were deleted. Any assessments of litigation, you know, of this type here, the - what we think this case is worth or that case is worth, any of that kind of stuff was withheld.

There is no document of the type he has described that was withheld. I have looked at everything

that was produced that was made available for production, and I know of nothing of that sort that was withheld. The only thing that I'm aware of that was withheld were matters relating to litigation.

MR. ROEDDER: Judge, if it is that simple, if the redaction or withholdings of the minutes on litigation [p. 894] reports, it ought to be very simple. Some may be privileged and some may not be, depending on what I have asked for.

THE COURT: Okay. I've heard all the arguments and I'll withhold ruling on it until this afternoon. If you want to talk about it, y'all talk about it. And if you can resolve it, fine. If you can't, I will resolve it.

MR. ROEDDER: I have some other discovery matters if I could cover them briefly. Paragraph two in the motion before your Honor asks about the number of cancer policies that were changed, the numbers of exchanges that occurred on a year-by-year basis, the relevance. And the reason we need that is that they had two cancer exchange programs, at least, maybe more. They had supplemental policies that were sometimes exchanged, and senior policies that were sometimes exchanged. There was a lot of exchanging in cancer. They are getting released if the release stands like it is as far as for all that up until the current time. And, that includes not only what was done back in 1986 that the basic evidence was about, but things that occurred later. So, we would like to show their continuing switching and continuing fraud continued up until this day, and that is the information that we need about -



THE COURT: (Interposing) Up until today? [p. 895] They are still doing it?

MR. PENNINGTON: That is not true. Our last cancer exchange program ended in '91. In fact, the last policy we came out with, and I filed an affidavit on this too, is that the last exchange program - I mean the last policy we came out with you weren't eligible for it. So, no, we are not.

MR. ROEDDER: And there is a problem with the affidavit, and that is another problem. I got an affidavit faxed after I left Mobile, and my secretary sent over last night, saying - and, I guess to address this issue, saying that the last cancer exchange program, very carefully worded, began in 1990, and no additional cancer exchange programs have occurred. Well, that doesn't answer the question. The question is, have any cancer policies been exchanged? Have individuals been defrauded into exchanging policies, whether you had a program as such or not? And they duck that issue.

MR. PENNINGTON: No, we don't duck that issue.

THE COURT: What has that got to do with your objectors?

MR. ROEDDER: The release that they are getting, my objectors got switched early and late, past the time that they say they quit switching in 1990 or '91. Some of my folks still got switched, and a lot of people [p. 896] still got switched. They are getting released from all that if the release holds as broad as -

THE COURT: (Interposing) Well, it is part of the class they are getting released.

MR. ROEDDER: As I understand it, the class involves any switch at any time up until now. And, so, I would like to show for the record that they have continued these exchanges up until now, and the affidavit - and that is why I have asked the question that I want your Honor to, hopefully, have them answer. They filed an affidavit yesterday that we object to that ducks the question. I'll show you, your Honor, the affidavit -

MR. PENNINGTON: (Interposing) What was the Fairness Hearing about?

THE COURT: I thought that is what we had the Fairness Hearing for. I'm not trying the Fairness Hearing. I understand your motion. Let's move on to something else. Denied.

MR. ROEDDER: For the record, your Honor, on that affidavit, it is the affidavit of Mr. Morrison, and we object to that as coming too late. We can't examine the man, and it is hearsay.

MR. PENNINGTON: Your Honor, I don't really have a strong opinion on that. I was simply responding to an argument that came out of the blue in their paper that [p. 897] said -

THE COURT: (Interposing) Anything that wasn't filed by the cutoff date is not going to be accepted, period.

MR. ROEDDER: Okay. The other affidavit, again, that was filed yesterday, is Mr. Linderman, and, again, we object to it as too late.

THE COURT: What did I just say?

MR. ROEDDER: I just wanted to identify for the record that the affidavits were -

THE COURT: Any of them, yours, his, or anybody else. It is just like the fax I had thrown in the trash can this morning. I didn't even look at it, too late. Sorry.

MR. ROEDDER: That was paragraph two, the exchanges that we have asked for. Paragraph three in the motion before your Honor has miscellaneous items in it that were asked by Frank in interrogatories or Requests for Production and were not responded to. One has to do with regards to the compensation of officers and directors, how was it affected by Liberty National performance, officers and directors of Torchmark.

Another has to do - there are a bunch of loan servants here where Torchmark employees would be loaned to Liberty National and Liberty National employees [p. 898] would be loaned to Torchmark to do services. And, we would like to know what - and they have identified those people, and there were a number of them, 15 to 20 of them, we want to know what services they provided, we want to know a little bit more about the interchange of the employees between those two companies. That is paragraph 3-B.

MR. PENNINGTON: Your Honor, I would suggest that these issues be ruled upon as part of your order. We have got all the evidence before you, and I think the only way to resolve this is have you review the evidence and decide whether you think it is adequate or not. I believe Frank has precluded it is adequate or else he

would have said so; but, it is up to you to say whether it is adequate or not. And, until you have looked at what the depositions say and how far they go in these issues, I don't see how -

MR. GEWIN: And that was gone into in these depositions.

MR. ROEDDER: Okay. And I'm not going to push the matter, but what happens in depositions is we would ask an individual, we couldn't ask Liberty National about the compensation of all directors; but, at any rate, I think it is adequately set forth in my Motion for Discovery that we want. We will leave that in your Honor's good hands.

THE COURT: All right.

MR. ROEDDER: I believe that is all I have. [p. 899] Thank you.

THE COURT: Okay. Is that it?

MR. ROEDDER: That is all I have, your Honor.

MR. WATSON: Slade Watson here.

This is not a request for a ruling on the pending motion for -

THE COURT: (Interposing) Well, then I don't care about hearing it.

MR. WATSON: Sir?

THE COURT: I don't care about hearing it, then.

MR. WATSON: Well, one thing I need is a clarification to a motion that I think you already ruled on.

THE COURT: What do you need to clarify? Whether it is denied or -

MR. WATSON: Well, what happens is that under the Fairness Hearing you denied the motion that we had to identify the subclass.

THE COURT: I remember that.

MR. WATSON: In the order of February 4th you specifically recognized the subclass that we asked you to identify. We then filed a motion for you to reconsider which motions expired on its terms - to expire on April the 25th, and we would like to ask your Honor in its order [p. 900] - in your order to simply note that that motion was filed with the court, the court declined to rule on it, and to allow it to be denied on it by the time.

THE COURT: Well, I guess the record will show whether or not I ruled on it or not. I won't put in there that I declined to rule on it.

MR. GEWIN: I think you did rule on it, your Honor. I don't believe it was a final judgment, it hasn't been finalized yet; but 42 days won't start to run until the final order.

MR. PENNINGTON: I want the record to show I don't agree that you recognized any subclass in the February 4th order.

MR. WATSON: Just to be clear for -

THE COURT: (Interposing) Wait, wait. That is all I want.

MR. WATSON: All right.

THE COURT: I'll see you.

MR. WILSON: Judge, I think it is probably appropriate for the class counsel to speak to the motion we filed to amend the - to modify your prior order in which we sought to delete Torchmark as a release. The basis of that was it was pointed out during the course of the Fairness Hearing, and quite properly so, that, perhaps, there had not been as much discovery on that issue as there [p. 901] should have been, and there was not enough factual basis submitted to the court to make that decision. As with many issues in this case, we would love to have Torchmark deleted from that release; however, having done the discovery, we think it is appropriate and necessary to look at the possibility of a claim against Torchmark. We are not willing to have the settlement lost as a result of deleting Torchmark from the release.

I understand from the response that has been filed on behalf of Torchmark and Liberty National that that is a non-negotiable item, and as class counsel we think the benefits provided to the class members by this settlement are such that the possibility of pursuing Torchmark and being successful in that is not great enough to justify turning down the substantial offer that is on the table at this point. So, I just thought it important that we present that to the court, also. Obviously, you will have to independently determine your feeling on that by looking at what we have done on discovery. But, I thought it was important -

THE COURT: (Interposing) I knew when I set this hearing with Beasley not here that it would go a lot smoother.



Okay, anything else?

MR. ROEDDER: Well, Judge, we feel differently [p. 902] than Frank.

THE COURT: All right, any written arguments y'all want to submit about what the evidence showed in the depositions go ahead and submit it within seven days. I haven't had the depositions and haven't read the stuff; but, anything that you want to point out or want to make sure I look at in any of the depositions or anything, file that in writing within seven days. In addition, file any additional arguments that you want to make in writing within seven days.

MR. PENNINGTON: Your Honor, just so I'm clear, I wouldn't expect to file anything in response, but if I needed to, if I saw something that I needed to respond to, would I have that opportunity?

THE COURT: File it. File whatever you want to.

MR. ROEDDER: Within seven days?

THE COURT: Yes.

MR. WALDROP: On the motion to modify the court order, Frank, that y'all filed, that really had two grounds: one dealt with Torchmark and would be - dealt with the release. As I understood what you had to say about Torchmark, y'all still maintain the same position in that regards too; that is, that the release should be limited?

[p. 903] MR. WILSON: Yes, very much so. I think that as we have gone on, and discussions have been had, it has become more and more clear that it is less and

less clear exactly how it is limited, but I think the judge has indicated its feeling on switches released and switches not released.

MR. PENNINGTON: With the exception of old policyholders who never offered -

THE COURT: That is right. They still get the benefits. You're talking about the old policyholder if they didn't get switched - got offered and didn't get switched.

MR. PENNINGTON: That is a release claim, too.

MR. WILSON: It is not the intent of plaintiffs' counsel, and my construction of what the court has said, and I guess I shouldn't speak for the court, it is not the intent of plaintiffs' counsel for a claim unrelated to the switch to be released. I mean, we can all think of hypotheticals on both sides, and you can get down to a hypothetical -

THE COURT: (Interposing) We can play "what ifs", but I don't let the children play "what ifs".

MR. WALDROP: I just wanted to point out to the court that in the motion to modify that dealt with Torchmark, class counsel had said to limit - in other [p. 904] words, what is proposed now in the release - excuse me, in the notice and prior order is much broader than what class counsel has here. And we are just saying on behalf of what class counsel put forward, the objectors, at least we do agree that the release should be limited to this that the class counsel has proposed. In other words, the entire litigation, as we had appreciated it, dealt with the relative value between the old and the

new, and the failure to disclose on the limits on radiation and chemotherapy, not independent frauds that dealt with even when they were making exchanges. Independent fraud, that had nothing to do with this issue, then our position is that it is not released.

MR. PENNINGTON: This is the same – this is just another version of the same argument we just had where you said you were going to take all of these things after the appeal.

MR. WALDROP: Well, I wanted to point out in their order they set out some language here –

THE COURT: In their motion?

MR. WALDROP: Excuse me, I'm sorry.

MR. PENNINGTON: But, your Honor, I signed a written document on June 16th, 1993, saying, "This is the release which I agree to," and that is what is on the table for approval at this time.

[p. 905] MR. WILSON: I don't believe that the court is bound by that. I mean, many things have happened since then, and I think, obviously, the court can decide –

THE COURT: (Interposing) Well, I'm going to issue my order on the whole –

MR. WILSON: – how broad that release is going to be.

I'll put it this way. I think there may be some difference of opinion between Liberty National counsel and class counsel as to how to construe the language of that

release. And, I think it is important that your Honor's order make clear how you – you have got to make it clear to tell everybody, because I do think Mike and I have a very difference of opinion.

MR. PENNINGTON: I don't think we do. I think it is a matter of semantics; but, every time somebody wants to change a word here or there it can have a big impact. It is an expensive settlement for us, your Honor.

MR. WALDROP: But, the language is – of the release that you wrote is about this broad and what – the language that class counsel is talking about is here.

MR. WILSON: I think his is about that long here, and mine is that long.

MR. WALDROP: Anyway, it is very – it is a very significant issue, your Honor. That is all.

[p. 906] THE COURT: Okay.

What is your-all's problem between y'all?

MR. PENNINGTON: I don't think that we have one. I think it is a fear – that we have a fear on Frank's part. Every time we come up with a specific example, I don't think we have ever disagreed on a specific example.

MR. GEWIN: Our only position is, your Honor, we are paying a lot of money for that release. We bargained for that release. It was in the agreement that the parties signed all four –

THE COURT: (Interposing) Well, my only deal is, if it is not fair I'm not going along with it. If it is fair I'm going to let it go.

MR. GEWIN: Judge, that is your job, because somebody else said that earlier.

MR. WALDROP: Your Honor, that was the language that class counsel had proposed, and in their Motion to Modify, and I'm just saying I know on behalf of us, we agreed that that language is much, much fairer than the language that was previously put in the notice that was sent out.

MR. PENNINGTON: And the reason he does, your Honor, is because if you say that then the case we have talked about earlier where you said that if what I was [p. 907] saying was right was right, it is released, wouldn't be released. That is why he is saying that. Because he is going to say don't arise out -

THE COURT: (Interposing) I understand the argument, and I'll rule.

MR. WALDROP: Thank you.

THE COURT: Okay, anything else? (No response.) All right. I would like to see in my chambers the class counsel, counsel for Liberty National, Bill, Norman, and Charles.

(THEREUPON, court stood adjourned at 10:35 a.m.)

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IN THE CIRCUIT COURT WITHIN AND FOR  
THE COUNTY OF BARBOUR  
STATE OF ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBINSON,	)	
PLAINTIFF,	)	
VS.	)	CIVIL ACTION
LIBERTY NATIONAL LIFE	)	<u>NO. CV-92-021</u>
INSURANCE COMPANY,	)	
DEFENDANT.	)	

REPORTER'S CERTIFICATE OF COMPLETION

I, ANDREW J. CLINGAN, JR., RPR, CCR, Official Court Reporter for the Third Judicial Circuit of Alabama, do hereby certify that I have this date completed and filed with the clerk of the trial court the original and three (3) copies of a true and correct transcript of the proceedings had by means of Computer-Assisted Transcription by CIMMARON as designated by counsel for the Appellants. All pages are numbered serially in the top right-hand corner, and ending with the page number appearing at the top of this certificate.

I certify that a copy of this certificate has this day been served on: Clerk of the Supreme Court of Alabama, counsel for the Appellants, and counsel for the Appellee.

Dated this the                      day of July, 1994.

/s/ Andrew J. Clingan, Jr.  
Andrew J. Clingan, Jr.



5

No. 95-1873

Supreme Court, U. S.  
F I L E D

NOV 12 1996

In The  
Supreme Court of the United States

October Term, 1996

GUY E. ADAMS, et al.,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

On Writ Of Certiorari To The  
Supreme Court Of Alabama

JOINT APPENDIX  
VOLUME III, PAGES 537-815

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*Liberty National Life*  
*Insurance Company*

Petition For Certiorari Filed May 16, 1996  
Certiorari Granted October 1, 1996

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**IN THE CIRCUIT COURT FOR**  
**BARBOUR COUNTY, ALABAMA**  
**Clayton Division**

CHARLIE FRANK ROBERTSON, )	
for himself, and in his )	
representative capacity for the )	
class of persons described herein, )	Case Number:
Plaintiff, )	CV-92-021
vs. )	
LIBERTY NATIONAL LIFE )	
INSURANCE COMPANY, )	
Defendant. )	

**AFFIDAVIT OF WILFRED L. THORNTHWAITE**

(Filed January 24, 1994)

STATE OF TENNESSEE  
COUNTY OF WILLIAMSON

Before me, the undersigned notary public in and for said county and said state, personally appeared WILFRED L. THORNTHWAITE, who, being known to me and having been first duly sworn and placed under oath, deposes and says as follows:

1. My name is Wilfred L. Thornthwaite. I have personal knowledge of the matters set forth in this affidavit based upon my education, my experience as an actuary, my experience in the insurance business, and based upon the materials I have reviewed and the work I have performed over the last several months relating to cancer

insurance policies issued by Liberty National Life Insurance Company ("Liberty National"). My education, professional experience and qualifications as an actuary including the following:

(a). I am presently President of Thornthwaite & Co., an insurance consulting firm located in Brentwood, Tennessee. Thornthwaite & Co. provides actuarial consulting services for a variety of clients, private and governmental, related to the insurance industry. My business address is Thornthwaite & Co., 100 Winners Circle, Suite 200, Brentwood, Tennessee 37027.

(b). I obtained a Bachelor of Science Degree in 1963 in Accounting in 1963 from what is now David Lipscomb University in Nashville. In 1979, I obtained a Masters of Business Administration with an emphasis in Marketing from the University of Tennessee at Nashville. I am a Fellow, Society of Actuaries (FSA); a member of the American Academy of Actuaries (MAAA); a Fellow of the Conference of Consulting Actuaries (FCA) and an Enrolled Actuary (EA).

(c). My work experience includes working as an assistant actuary for Fidelity Mutual Life Insurance Company in Radnor, Pennsylvania from 1969 to 1976. During that period of time I was responsible for all corporate product development including individual, group and pension products. From 1976 to 1984 I served as Vice-President of National Life and Accident Insurance Company, Nashville, Tennessee. I was responsible for marketing, administration and product management of the employee benefit product line, including group, life and health

products, voluntary insurance programs and tax qualified plans. I was also responsible for management of corporate benefit programs. In the course of my work for National Life and Accident Insurance Company, I priced a cancer insurance policy issued by that company.

(d). A summary of my curriculum vitae is attached hereto as Exhibit "A". I have been retained as an expert witness for consulting in connection with various litigation matters. I have been retained by governmental agencies on more than one occasion concerning insurance issues. I have also testified as an expert in connection with private litigation involving actuarial issues related to insurance.

2. I was retained by the plaintiffs in *Edith N. McAllister v. Liberty National Life Insurance Company, et al.*, CV-92-4085, a case in the Circuit Court of Mobile County, Alabama ("McAllister"), to analyze certain cancer insurance policies issued by Liberty National and to review the cancer exchange programs conducted by Liberty National Insurance Company in 1986 and thereafter. I reviewed (a) all of the depositions taken in the McAllister case and the exhibits thereto with the exception of the medical depositions, (b) the documents produced by Liberty National to the plaintiffs and (c) Liberty National's responses to written discovery propounded by the plaintiffs. Among the Liberty National documents I reviewed was a breakdown of the benefits paid by Liberty National by benefit category for each policy and plan issued by Liberty National for the years 1986 through 1992.

3. I testified at the trial of the McAllister case and gave certain opinions in regard to (1) the relative value of

certain cancer insurance policies issued by Liberty National prior to 1986 ("old policies") which provided unlimited benefits for radiation, chemotherapy and prescription drugs out-of-the-hospital when compared with the benefits in the cancer insurance policies issued by Liberty National in 1986 and subsequent to 1986 ("new policies"); (2) the cancer exchange programs Liberty National carried out in 1986 and thereafter; and (3) the damages suffered by the plaintiffs. For the Court's reference, this affidavit summarizes my testimony in the McAllister case in regard to these opinions:

(a). *The old policies providing unlimited coverage for radiation, chemotherapy and prescription drugs out of the hospital are more valuable to a policyholder because these policies are a greater, more valuable package of benefits.* In my opinion as an actuary the best information to analyze the relative value of the benefits afforded by a policy is the company's own experience, and in this case, the best way to analyze the relative value of the benefits afforded by the old and new policies is to analyze the claims costs incurred by Liberty National with respect to two comparable groups of insureds. I compared the claims made in 1991 and 1992, respectively, by persons insured under Plans 505, 506, 509, 510, 564 and 565 (old policies) with claims made during the same period by persons insured under Plans 5GL, 5GM and 5GN (new policies). Plans 5GL, 5GM and 5GN were designated as plans sold to persons exchanging their new policies. By 1991, the majority of persons in Plans 5GL, 5GM and 5GN would have had their policies exchanged again and the persons insured under these plans in 1991 and 1992 would have been a comparable

group of insureds to the persons still insured under Plans 505, 506, 509, 510, 564 and 565. I checked the ages of the insureds and the number of insureds and these appeared to be comparable groups of policyholders. I then compared the benefits paid under these respective plans for 1991 and 1992, respectively.

In 1991, the average amount of benefits paid per policy under the old plans was \$222.66 and the average amount of benefits paid per policy under the new plans was \$188.80. In 1991, the payments for radiation, chemotherapy and prescription drugs out of the hospital constituted 79% of the total benefit dollars paid by Liberty National under the old policies but payments for these benefits constituted only 43.3% of the total benefit dollars paid under the new policies. The average annualized premium charged by Liberty National per policy in 1991, however, was higher under the new policies. For the old policies the average annualized premium per policy in 1991 was \$200.58 but for the new policies it was \$207.32. Copies of charts depicting these computations are attached hereto as Exhibits "B" and "C."

In 1992, the average amount of benefits paid per policy by Liberty National for the old policies was \$350.29 while the average amount of benefits paid per policy under the new policies was \$275.80. Payments for radiation, chemotherapy and prescription drugs out of the hospital constituted 80.4% of the total benefit dollars paid by Liberty National under the old plans in 1992 but payments for these benefits under the new policies was only 45.8% of the total benefit



dollars. Copies of charts depicting the computations are attached hereto as Exhibits "D" and "E."

Based upon my comparison of the benefits actually paid by Liberty National in 1991 and 1992 as aforesaid, in my opinion, the old policies providing unlimited coverage for radiation, chemotherapy and prescription drugs out of the hospital is more valuable to a policyholder because it provides a larger package of benefits. The value of the benefits for radiation, chemotherapy and prescription drugs outside the hospital clearly outweighs the value of any benefits added by Liberty National in the new policies, including the first occurrence benefit.

I reviewed the medical bills submitted by Grace I. Dismuke to Liberty National in connection with her claim for cancer insurance and I compared what Liberty National would have paid Mrs. Dismuke under her old policy with what Liberty National paid Mrs. Dismuke under her new policy. Based upon my comparison, Liberty National would have paid more of Mrs. Dismuke's bills under her old policy. Specifically, Mrs. Dismuke would have received \$6,004.00 more from Liberty National under her old policy. A chart showing the comparison of Mrs. Dismuke's bills is attached hereto as Exhibit "F". The bills which would have been paid under Mrs. Dismuke's old policy but which were not paid under the new policy were bills for radiation and prescription drugs outside the hospital. Mrs. Dismuke's claim is one example of the significance of the unlimited benefits for radiation, chemotherapy and prescription drugs

and her claim supports my conclusions in this case.

(b). *Liberty National's claim costs for the unlimited benefits for radiation, chemotherapy and drugs outside the hospital were increasing significantly by the mid 1980's and were perceived to be an increasing problem by Liberty National.* In reviewing the deposition testimony of Anthony McWhorter, Liberty National's interrogatory answers and the other documents produced by Liberty National, including Liberty National's loss ratios on the cancer insurance policies with unlimited benefits for radiation, chemotherapy and prescription drugs out-of-the-hospital, I found that the claims costs for the radiation, chemotherapy and prescription drugs out-of-the-hospital benefits were increasing significantly and were perceived to be an increasing problem by Liberty National.

(c). *The cancer exchange programs conducted by Liberty National were unfair to Liberty National's policyholders.* It is my opinion, and I so testified at the McAllister trial, that, based upon my review of the marketing materials Liberty National distributed to its agents in connection with the cancer exchange programs which Liberty National began in 1986, the cancer exchange programs were unfair to Liberty National's policyholders because Liberty National took no steps to ensure that policyholders were fully advised of the restrictions placed on the radiation and chemotherapy benefits and of the elimination of coverage for non-chemotherapy prescription drugs. I testified that, while exchange programs are not *per se* unfair, there was no evidence that Liberty

National emphasized or even suggested to its sales agents that they should explain to policyholders when an old policy was being exchanged that the unlimited benefits in the old policies were being restricted or eliminated in the new policies. I found no reference at all in any of the marketing materials distributed to Liberty National's agents in regard to these policies which suggested to the agents that they should explain that these benefits were being restricted or eliminated. In my experience it is in the custom and practice in the insurance industry that agents are instructed to tell policyholders about all changes in benefits and that it is emphasized to agents in situations where benefits are being restricted or eliminated that an insured should be advised fully about any benefits which are being restricted or eliminated. In my opinion, in an exchange situation an agent has a duty to explain to an insured any benefits which are being reduced or eliminated. The safest way for an insurance company to be sure that the insured is given information about any benefits which are being reduced or eliminated is to put the information in the sales brochure to be utilized by agents when making the exchange. Liberty National, however, did not include any information about benefits which were being restricted or eliminated in the brochures relating to the new policies. In fact, the sales brochures did not compare the benefits in new policies with the benefits in the old policies on a benefit by benefit basis. I further testified that, in my opinion, the commission structure paid to agents, which is reflected in McAllister Plaintiff's Exhibits 68 and 74, constituted an incentive for agents to exchange policies.

(d). *Mrs. McAllister paid more in premiums for the new policies than she would have paid if she had kept the old policies.* I reviewed the premiums paid by Edith McAllister for the cancer insurance policies she purchased for herself and for her daughter, Ursula Graham. I compared the premiums she paid on the new policies with the amount she would have paid in premiums for her old policies if her policies had not been exchanged. A copy of a chart showing the premiums paid by Mrs. McAllister on her new policies and what she would have paid on her old policy is attached hereto as Exhibit "G." A copy of a similar chart relating to the policies Mrs. McAllister purchased for her daughter, Ursula Graham, is attached hereto as Exhibit "H." As reflected by these charts, if Mrs. McAllister had retained her old policy, in 1992 she would have paid \$285.00 in premiums on her old policy but the premiums on her new policy were \$308.00. The premiums on the old policy covering Mrs. Graham would have been \$132.00 in 1992 but the premiums on the new policy were \$172.00. Attached hereto as Exhibits "I" and "J" respectively are graphs illustrating the difference in the premiums paid by Mrs. McAllister on the policies she purchased for herself and Ursula Graham, respectively. I calculated the difference in the premiums charged Edith McAllister for her policy and the policy she purchased for her daughter, Ursula Graham, from the time the policies were first exchanged on February 1, 1987. A copy of a chart summarizing these calculations is attached hereto as Exhibit "K". As reflected by the chart, as of October 12, 1993, Mrs. McAllister had paid \$517.47 more in premiums for her new policy and \$209.01 in more

in premiums on the policy she purchased for her daughter, Ursula Graham.

(e). *The cancer exchange program was a means by which Liberty National moved insureds into higher age-brackets which resulted in them paying higher premiums.* Part of the increase in premiums charged both Mrs. McAllister and Ursula Graham was a result of Liberty National's moving its insureds into higher age brackets through the cancer exchange programs. Mrs. McAllister's old policy provided, for example, that, while Liberty National had the right to raise premiums on her policy, her premiums would always be based upon her age at the time that she obtained the policy. Mrs. McAllister's old policy was issued to her on April 1, 1982, when she was 50 years old. Under Plan 564 there were eight age brackets and Mrs. McAllister was in a "middle" age bracket for persons aged 46-50. In the exchange program, when an insured agreed to exchange an old policy, the rate for the premium for the new policy was based on the insured's age at the time of the exchange. When Mrs. McAllister's policy was first exchanged on February 1, 1987, she was 54. Premiums for the 5G series of policies issued in 1986 were based on only three age brackets and Mrs. McAllister was in the highest age bracket for persons aged 51-64. Mrs. Graham similarly was moved from a low age bracket to a middle age bracket at the time her policy was exchanged the second time.

Further affiant sayeth not.

/s/ Wilfred L. Thornthwaite  
Wilfred L. Thornthwaite

Sworn to and subscribed  
before me this 18th day of  
January, 1994.

/s/ Karen M. Dallas  
NOTARY PUBLIC

My Commission Expires: July 23, 1994

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& REEVES  
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By: /s/ Norman E. Waldrop, Jr.  
Norman E. Waldrop, Jr.

By: /s/ M. Kathleen Miller  
M. Kathleen Miller

#### CERTIFICATE OF SERVICE

I hereby certify that I have on this the 24th of January, 1994, served a copy of the foregoing pleading upon:

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P. O. Box 1826  
Mobile, AL 36633

by depositing a copy of same in the United States mail,  
properly addressed and postage prepaid.

/s/ M. Kathleen Miller

#### EXHIBIT "A"

WILFRED L. THORNTHWAITE, FSA

#### RELEVANT EXPERIENCE

1984-present: President, Thornthwaite & Co.,  
Brentwood, TN. Actuarial consulting firm pro-  
viding insurance and employee benefit consult-  
ing services.

1976-84: Vice President, National Life & Accident  
Insurance Co. Nashville, TN. Responsible for  
marketing, administration and product man-  
agement of employee benefit product line  
including group life and health, voluntary  
insurance programs, and tax qualified plans.

Also responsible for management of corporate  
benefit programs.

1969-76: Assistant Actuary, Fidelity Mutual Life  
Insurance Co. Radnor, PA. Responsible for all  
corporate product development including indi-  
vidual, group and pension products.

#### EDUCATION

BAS (Accounting) David Lipscomb University

MBA (Marketing) University of Tennessee

Graduate studies in life contingencies at North-  
eastern University

#### ACTUARIAL DESIGNATIONS

Fellow, Society of Actuaries (FSA)

Member, American Academy of Actuaries (MAAA)

Fellow, Conference of Consulting Actuaries (FCA)

Enrolled Actuary (EA)

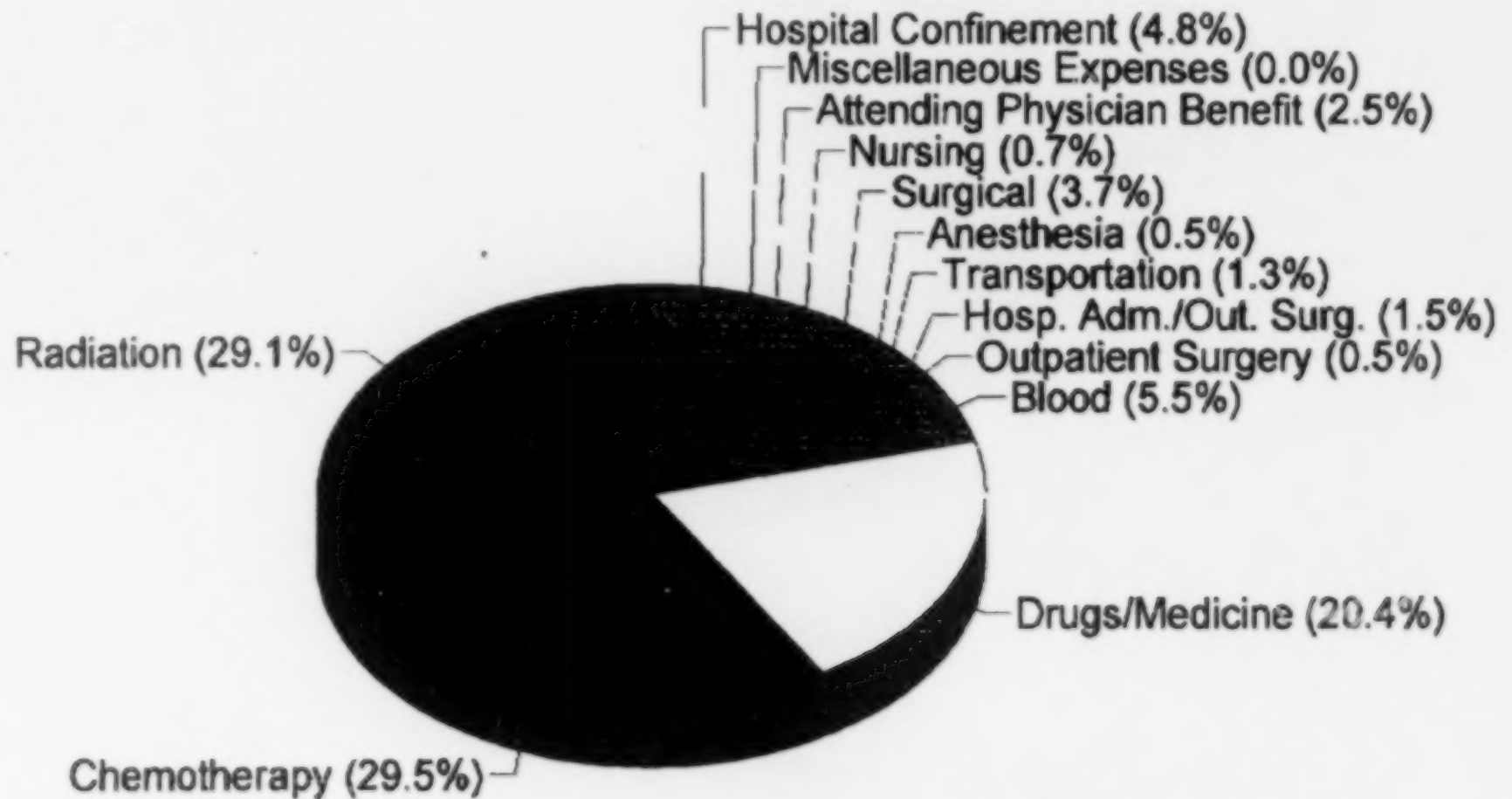
#### OTHER DESIGNATIONS

Fellow, Life Management Institute (FLMI)-Pension  
Planning

Chartered Life Underwriter (CLU)

Chartered Financial Consultant (ChFC)

## LIBERTY NATIONAL LIFE INSURANCE COMPANY

Cancer Expense Plans  
Comparison of Benefits  
1991

Plans 505, 506, 509, 510, 564, 565

Average Benefits Paid per Policy

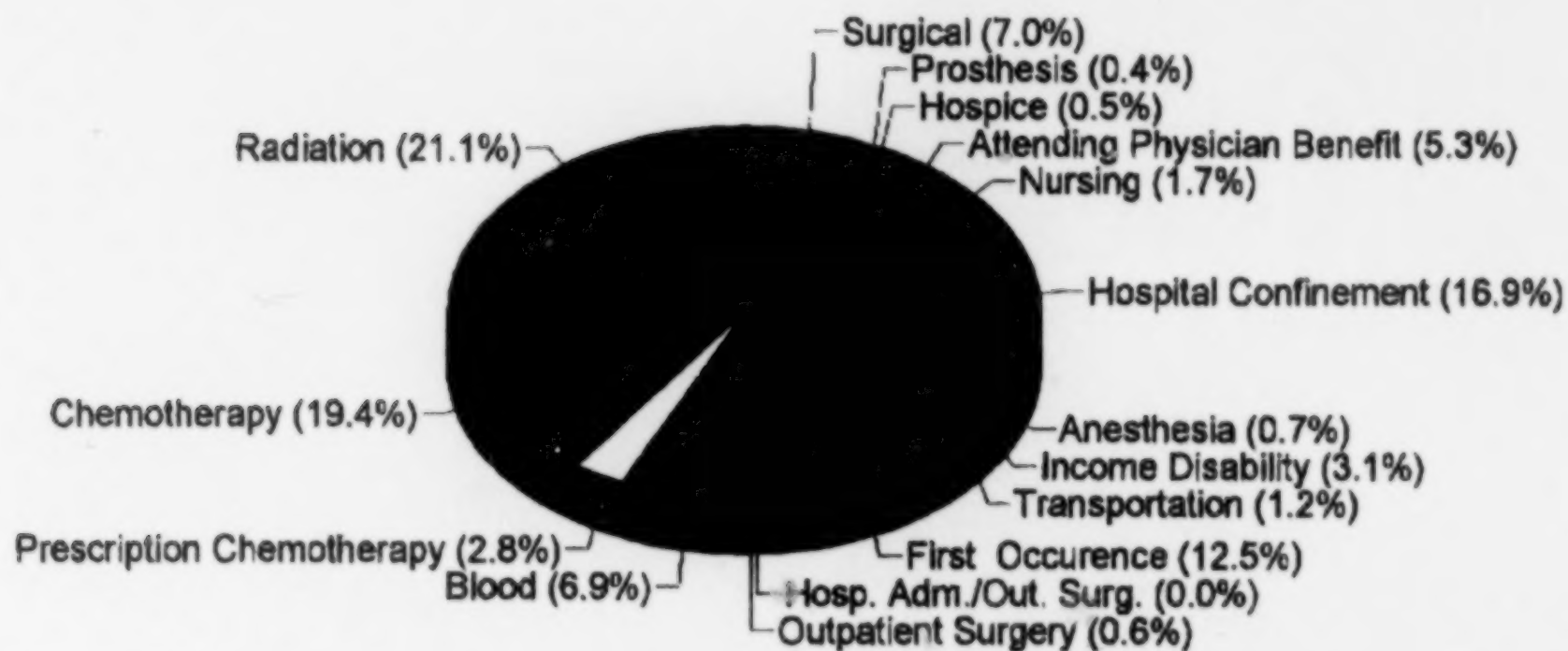
\$222.66

Average Annualized Premium per Policy

\$200.58



## LIBERTY NATIONAL LIFE INSURANCE COMPANY

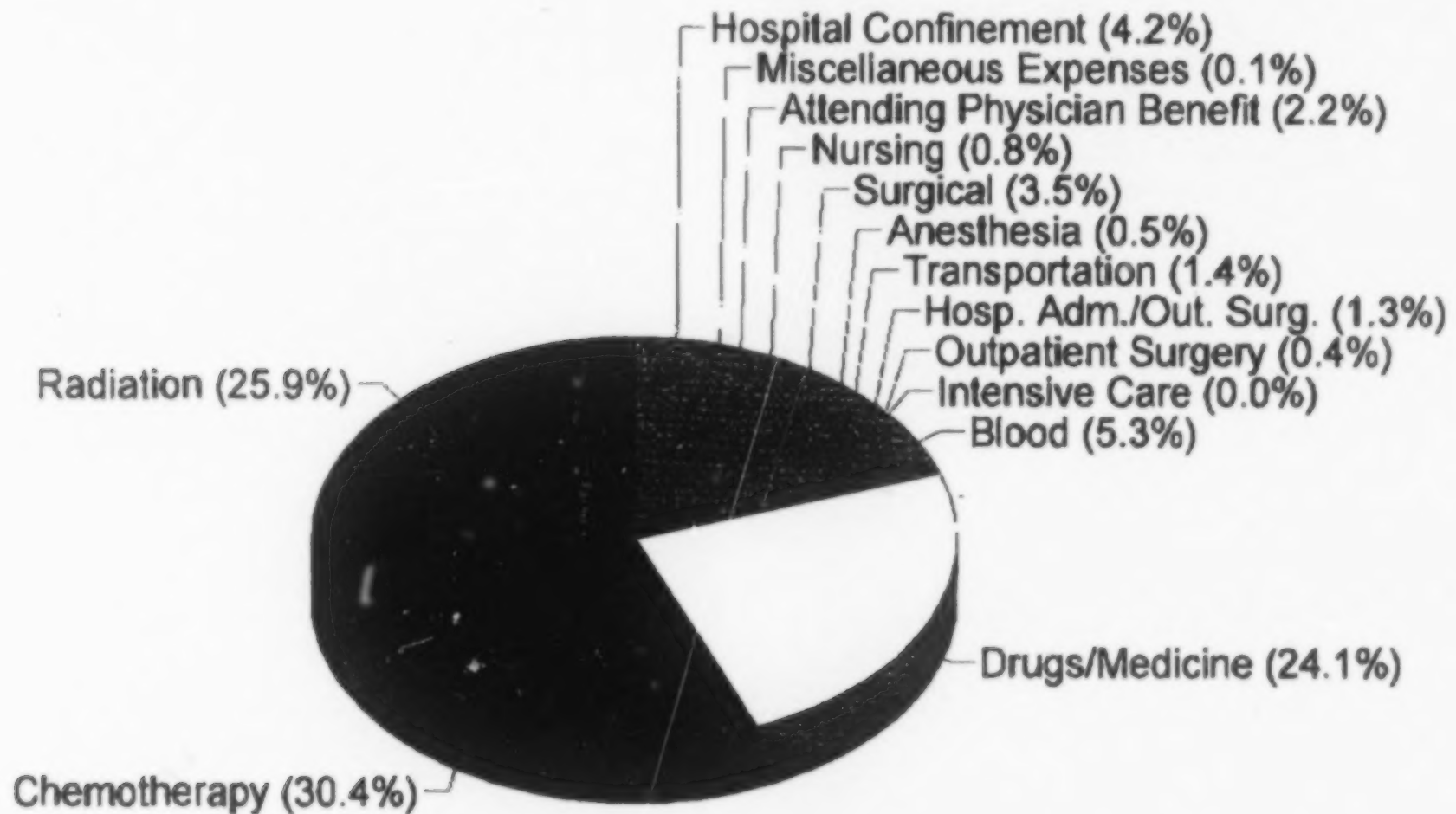
Cancer Expense Plans  
Comparison of Benefits  
1991

Plans 5GL, 5GM, 5GN

Average Benefits Paid per Policy \$188.80

Average Annualized Premium per Policy \$207.32

## LIBERTY NATIONAL LIFE INSURANCE COMPANY

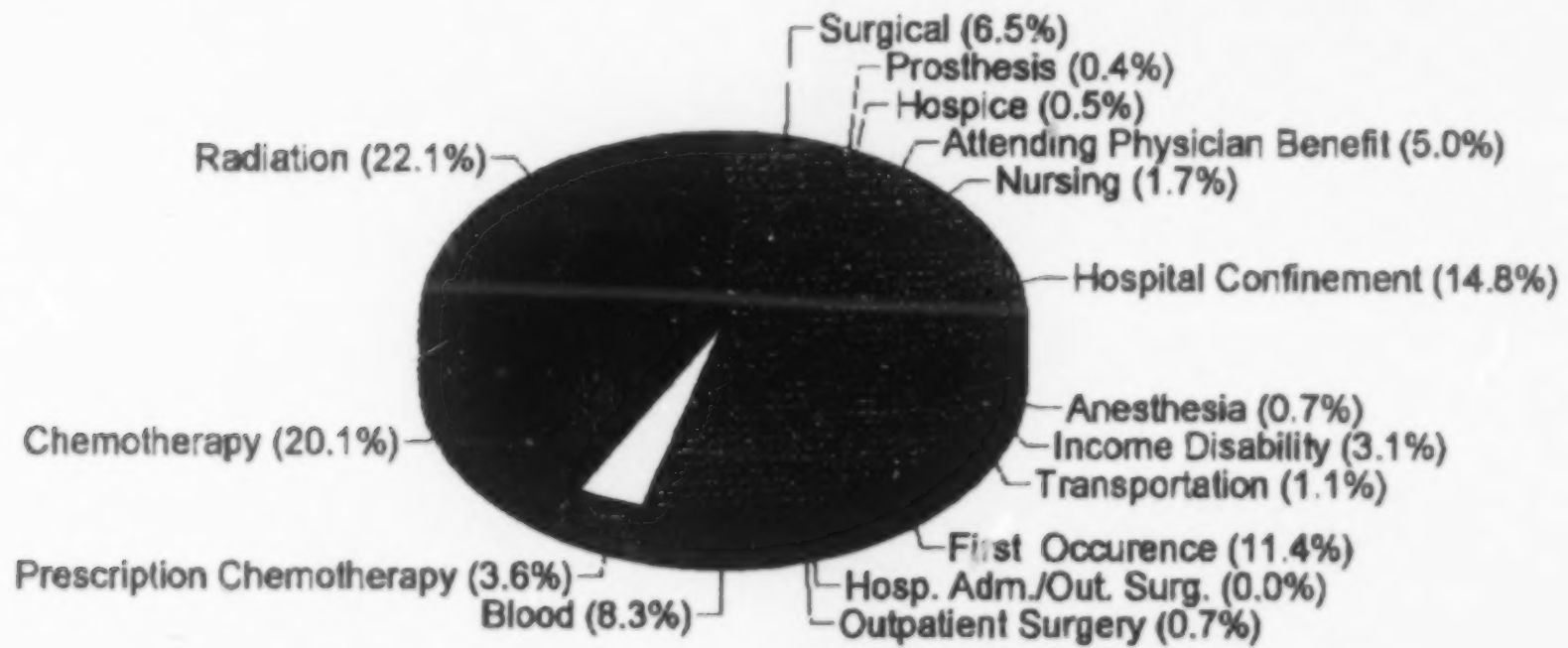
Cancer Expense Plans  
Comparison of Benefits  
1992

Plans 505, 506, 509, 510, 564, 565

Average Benefits Paid per Policy \$350.29

Average Annualized Premium per Policy \$319.35

## LIBERTY NATIONAL LIFE INSURANCE COMPANY

Cancer Expense Plans  
Comparison of Benefits  
1992

Plans 5GL, 5GM, 5GN

Average Benefits Paid per Policy \$275.80

Average Annualized Premium per Policy \$347.18



**DIFFERENCE IN BENEFITS  
OLD POLICY AND NEW POLICY  
GRACE DISMUKE**

MEDICAL PROVIDER	DATE OF SERVICE	TOTAL CHARGES	WHAT LIBERTY NATIONAL WOULD HAVE PAID UNDER OLD POLICY	PAID BY LIBERTY NATIONAL UNDER NEW POLICY
Department of Anesthesiology (USAMC)	04/21/92	\$ 200.00	\$ 100.00 (max.)	\$ 43.75 (max. 25%)
Anesthesia Services, P.C.	05/22/92	\$ 714.00	\$ 100.00 (max.)	\$ 272.75 (max. 25%)
Kenneth C. Brewington, M.D.	05/22/92	\$ 3,037.00	\$ 676.00 (2 procedures)	\$ 1,091.00 (2 procedures)
	09/21/92	\$ 37.00	\$ 15.00 (max.)	\$ 35.00 (max.)
	12/01/92	\$ 37.00	\$ 15.00 (max.)	\$ 35.00 (max.)
	03/08/93	\$ 37.00	\$ 15.00 (max.)	\$ 35.00 (max.)
	06/07/93	\$ 60.00	\$ 15.00 (max.)	\$ 35.00 (max.)
Internal Medicine & Oncology (Dr. Kessler)	05/23/92	\$ 376.00	\$ 60.00 (max. x 4 days)	\$ 140.00 (max. x 4 days)
Mobile Pathology Group, P.A.	09/09/92	\$ 55.00	\$ 15.00 (max.)	\$ 35.00 (max.)
Mostellar Medical Clinic	03/31/93	\$ 300.00	\$ 60.00 (D&C)	\$ 174.00 (D&C)
	04/13/93	\$	\$ 15.00 (max.)	\$ 35.00 (max.)
	05/06/93	\$ 22.00	\$ 15.00 (max.)	\$ 22.00 (max.)
Pathology Department, USA HSF	04/21/92	\$ 240.00	\$ 15.00 (max.)	\$ 35.00 (max.)
Pathology Laboratory Associates	05/22/93	\$ 200.00	\$ 15.00 (max.)	\$ 35.00 (max.)
Providence Hospital (Cancer Center)	07/01-31/92	\$ 4,301.00	\$ 4,208.00	\$ 3,179.00
	08/04-24/92	\$ 5,187.50	\$ 5,123.50	\$ 4,200.00
	09/25/92	\$ 2,023.00	\$ 2,023.00	\$ 500.00
	09/09/92	\$ 2,035.20	\$ 2,035.20	\$ -0-
	09/09/92	\$ 2,078.00	\$ 2,078.00	\$ -0-
Providence Outpatient Diagnostics	07/27/92	\$ 6.00	\$ 6.00	\$ 8.00
	08/13/92	\$ 6.00	\$ 6.00	\$ 8.00
Radiation Therapy-Oncology, P.C. (Dr. Cotter)	01/15/93	\$ 7,697.00	\$ 7,505.00 (\$75/max. phys.) (\$7,430/radiation)	\$ 5,194.00 (\$174/max. phys.) (\$5,020/radiation)
Springhill Diagnostic Radiologists, P.C.	07/06/92	\$ 49.00	\$ 15.00 (max.)	\$ 35.00 (max.)
	07/08/92	\$ 33.00	\$ 15.00 (max.)	\$ 35.00 (max.)
Springhill Emergency Physicians	07/08/92	\$ 217.00	\$ -0- (max.)	\$ -0- (max.)
Springhill Memorial Hospital	05/22-29/92	\$ 9,341.92	\$ 420.00 (max. x 7 days)	\$ 1,060.00 (max. x 7 days)
	07/06-08/92	\$ 2,037.43	\$ 120.00 (max. x 2 days)	\$ 300.00 (max. x 2 days)
USAMC	04/21/92	\$ 818.50	\$ 100.00 (max.)	\$ 150.00 (max.)
Family Discount Drugs & Variety	03/04/93	\$ 97.79	\$ 97.79	\$ -0-
First Hospital Pharmacy	09/09/92	\$ 25.05	\$ 25.05	\$ -0-
<b>OTHER BENEFITS</b>				
First Occurrence Benefit			\$ -0-	\$ 2,250.00
<b>GRAND TOTALS:</b>		<b>\$ 41,268.39</b>	<b>\$ 24,928.54</b>	<b>\$ 18,928.50</b>

**ANNUAL PREMIUM COMPARISON****Edith McAllister****D/B 6/2/32**

	<b>OLD POLICY</b>  Form 7022, Plan 564 Family Issued 4/1/82 Age 50 Bracket 46-50	<b>1987 NEW POLICY</b>  Form 5GL Individual Issued 2/1/87 Age 54 Bracket 51-64	<b>1990 NEW POLICY</b>  Form 5GR Individual Issued 3/1/91 Age 58 Bracket 51-65
1982	\$ 109.47		
1983			
1984			
1985			
1986			
1987		\$ 225.71	
1988	\$ 136.84 (effective 8/1/88)		
1989			
1990	\$ 183.00 (effective 4/1/90)	\$ 265.00 (effective 4/1/90)	
1991	\$ 235.00 (effective 4/15/91)		\$ 308.00
1992	\$ 285.00 (effective 4/15/92)		

**ANNUAL PREMIUM COMPARISON****Ursula Graham****D/B 1/2/52**

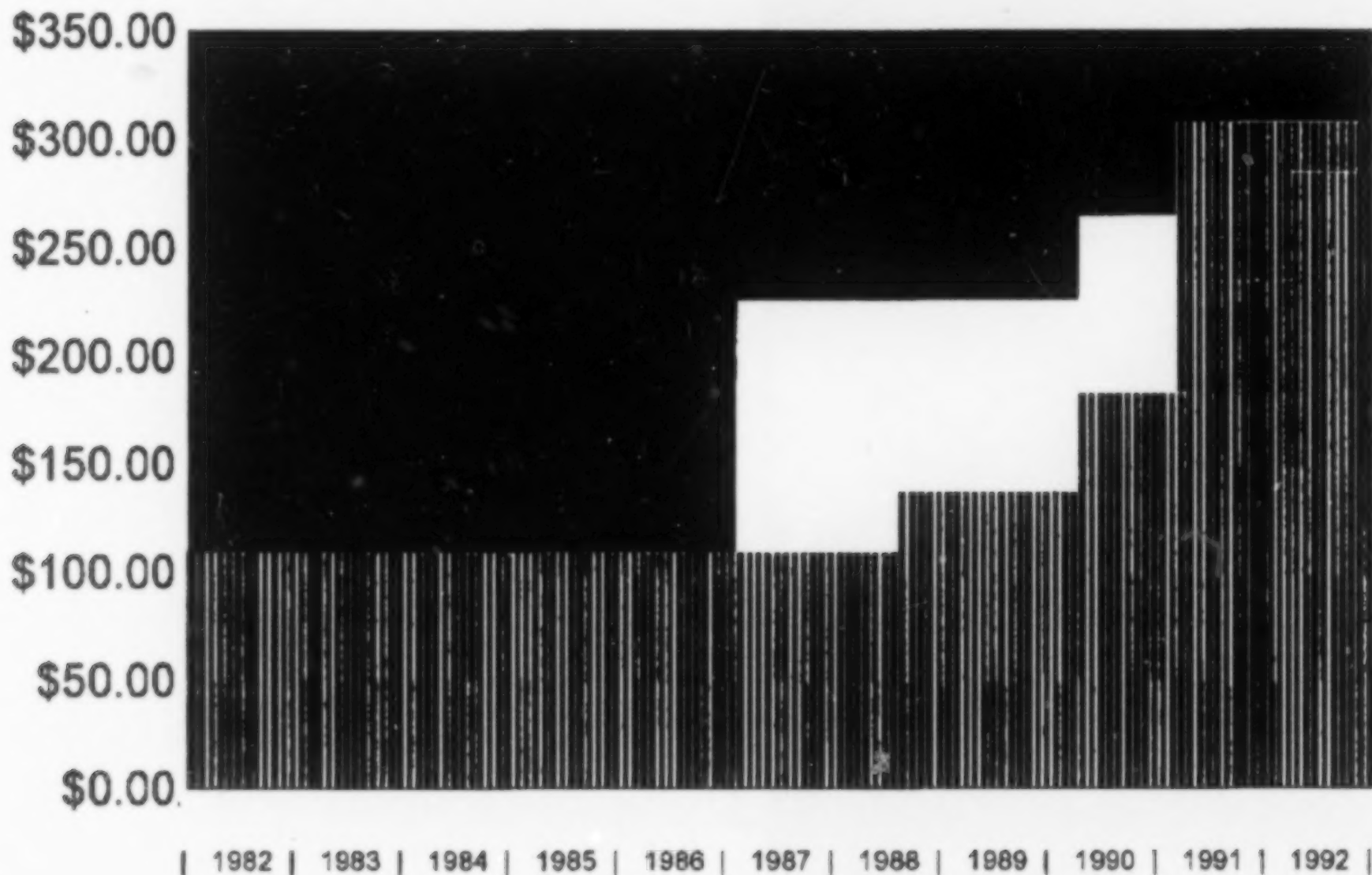
	<b>OLD POLICY</b>  Form 7022, Plan 564 Individual Issued 4/1/82 Age 30 Bracket 15-30	<b>1987 NEW POLICY</b>  Form 5GN Single Parent Issued 2/1/87 Age 35 Bracket 15-35	<b>1990 NEW POLICY</b>  Form 5GX Individual Issued 4/1/90 Age 38 Bracket 36-50
1982	\$ 46.31		
1983			
1984			
1985			
1986			
1987		\$ 85.71	
1988	\$ 63.15 (effective 8/1/88)		
1989			
1990	\$ 89.00 (effective 4/1/90)		\$ 172.00
1991	\$ 116.00 (effective 4/15/91)		
1992	\$ 132.00 (effective 4/15/92)		



487E

# ANNUAL PREMIUM COSTS

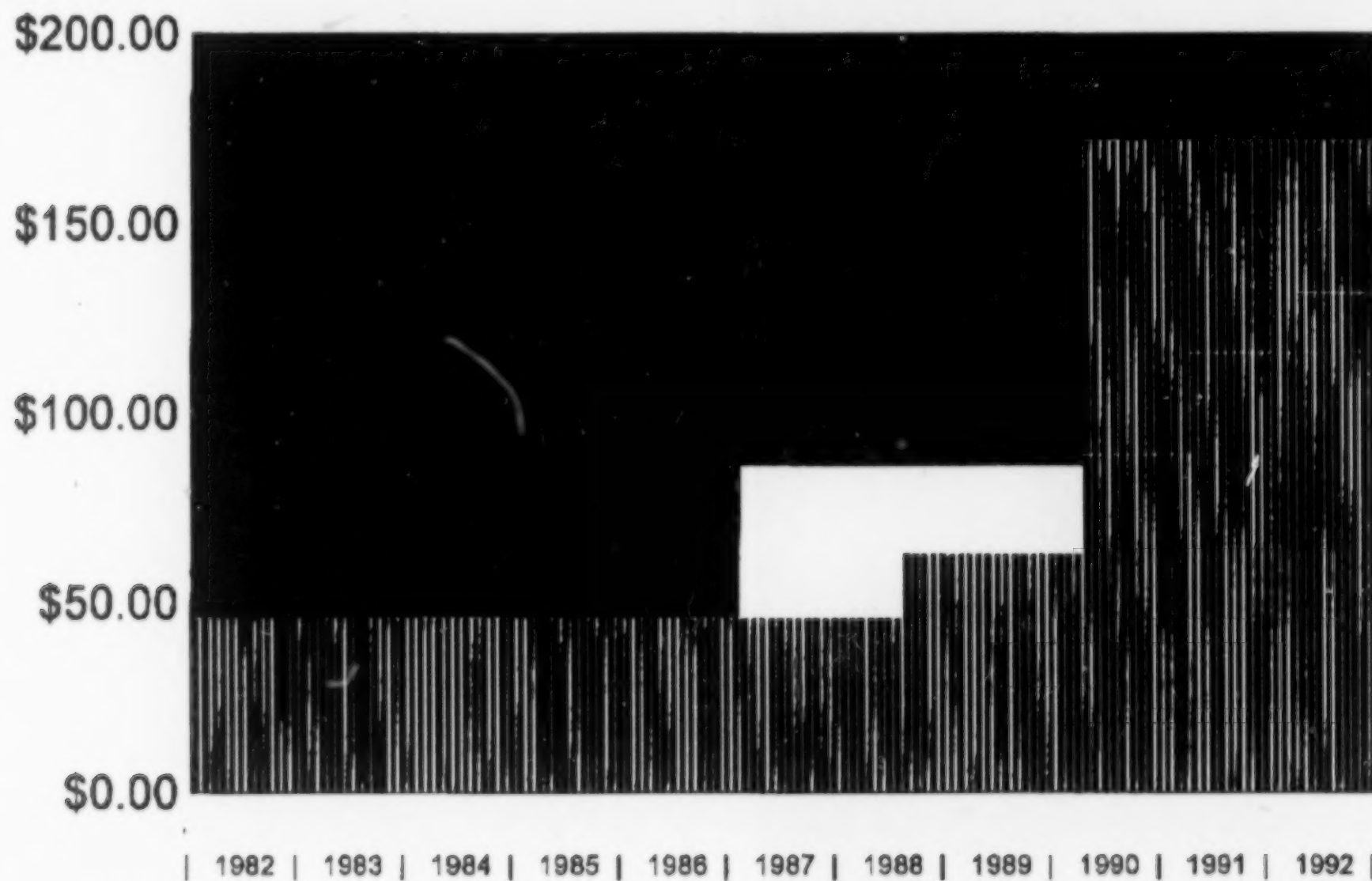
## Edith McAllister



■ Old Policy    1987 Policy    ■ 1990 Policy

# ANNUAL PREMIUM COSTS

## Ursula Graham



■ Old Policy    1987 Policy    ■ 1990 Policy

**DIFFERENCE IN PREMIUMS CHARGED EDITH McALLISTER**

Time Period	No. Months	Annual Premium Old Policy	Annual Premium New Policies	Difference in Annual Premiums	Additional Premium Charged
2/1/87-8/1/88	18 months	\$ 109.47	\$ 225.71	\$ 116.24	\$ 174.36
8/1/88-4/1/90	20 months	\$ 138.84	\$ 225.71	\$ 88.87	\$ 148.20
4/1/90-3/1/91	11 months	\$ 183.00	\$ 265.00	\$ 82.00	\$ 75.13
3/1/91-4/15/91	1 month	\$ 183.00	\$ 308.00	\$ 125.00	\$ 10.41
4/15/91-4/15/92	12 months	\$ 235.00	\$ 308.00	\$ 73.00	\$ 73.00
4/15/92-10/12/93	19 months	\$ 285.00	\$ 308.00	\$ 23.00	\$ 38.37
<b>TOTAL DIFFERENCE IN PREMIUMS CHARGED TO DATE:</b>					<b>\$ 517.47</b>

**DIFFERENCE IN PREMIUMS CHARGED URSULA GRAHAM**

Time Period	No. Months	Annual Premium Old Policy	Annual Premium New Policies	Difference in Annual Premiums	Additional Premium Charged
2/1/87-8/1/88	18 months	\$ 48.31	\$ 85.71	\$ 39.40	\$ 59.10
8/1/88-4/1/90	20 months	\$ 63.15	\$ 85.71	\$ 22.56	\$ 37.60
4/1/90-4/15/91	12 months	\$ 89.00	\$ 172.00	\$ 83.00	\$ 83.00
4/15/91-4/15/92	12 months	\$ 118.00	\$ 172.00	\$ 56.00	\$ 56.00
4/15/92-10/12/93	19 months	\$ 132.00	\$ 172.00	\$ 40.00	\$ 63.31
<b>TOTAL DIFFERENCE IN PREMIUMS CHARGED TO DATE:</b>					<b>\$ 299.01</b>



IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
Individually and on behalf of	)	
a class,	)	
	)	CIVIL ACTION
Plaintiffs,	)	NO.
	)	CV-92-021
v.	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	
	)	

STATE OF ALABAMA     )  
COUNTY OF JEFFERSON   )

AFFIDAVIT OF ANTHONY L. MCWHORTER

Before me, the undersigned notary public in and for said county and said state, personally appeared Anthony L. McWhorter, who being known to me and having been first duly sworn and placed under oath, deposes and says as follows:

1. My name is Anthony L. McWhorter. I am Executive Vice President and Chief Actuary of Liberty National Life Insurance Company. I have personal knowledge of the matters set forth in this affidavit based upon my experience as an actuary, my experience as an officer and employee of Liberty National Life Insurance Company, my knowledge of the business and records of Liberty National Life Insurance Company, and otherwise. The

opinions expressed herein are based upon this knowledge and upon my best actuarial judgment, and I hold these opinions to a reasonable degree of actuarial certainty.

2. My education, professional experience, and qualifications as an actuary include the following: I have a B.S. in Mathematics from the University of Alabama (1972) and an M.S. in Actuarial Science from Northeastern University, Boston, Massachusetts (1974). I have been employed by Liberty National in a variety of actuarial capacities since 1972. I was designated a Fellow of the Society of Actuaries (FSA) in 1976 and a member of the American Academy of Actuaries (MAAA) in 1978.

3. I am familiar with the alleged cancer exchange programs at issue in this lawsuit, as well as the various cancer insurance policies which are involved. Beginning in approximately 1969, Liberty National Life Insurance Company began selling certain cancer insurance policies. The following material summarizes the benefits structure of the major plans of cancer insurance sold by Liberty National. The first policies offered by Liberty National (Plans 504, 505, 506, 507 and 508) were guaranteed renewable to age 65. These policies offered coverage for radiation/chemotherapy treatment and prescription drugs without daily, annual or lifetime monetary limits, as well as certain other benefits that were subject to monetary limits. The 1969 series of policies described in this paragraph are "old policies" within the meaning of the June 16, 1993 Stipulation and Agreement of Compromise and Settlement ("the Stipulation") in the above-styled action. Various of the 1969 Series policies were also referred to at various times and in various states as Forms 7003, 7004, 7007, 7008, or as Plans 949, 958 or 959, or as Type 706, 707,

773, or 774. The differing code numbers reflect minor variations such as family versus individual coverage, variations in requirements by insurance departments of different states, weekly versus monthly premium payment, and the like.

4. In 1976, Liberty National introduced a new series of life insurance plans (Plans 501, 502, 509 and 510) which were identical to the 1969 series, except that the policies introduced in 1976 were "guaranteed renewable" for the life of the named insured. Plan 501 was also referred to for some purposes as Form 7012. Plan 502 was also referred to for some purposes as Form 7013. Plan 509 was referred to for some purposes as Type 579, 600, 629, 949, 997, 917, or as Plan 829, or as Form 7011, 579, 600, or 629. Plan 510 was also referred to for some purposes as Type 580, 601, 630, 950, 998, 918, or as Form 7010, 580, 601, or 630. Both the 1969 and 1976 series of policies (Plans 501, 502, 504, 505, 506, 507, 508, 509 and 510) provided reimbursement to the named insured (or his assignee) for the actual cost incurred for radiation or chemotherapy administered to a covered person under the policy. Similarly, both the 1969 and 1976 series policies also provided other benefits, such as hospital confinement benefits, surgical benefits, anesthetist benefits, attending physician and private duty nursing expense benefits, and non-chemotherapy prescription drug benefits, all of which (with the exception of the non-chemotherapy prescription drug benefit) were subject to maximum monetary limits. Both the 1969 and 1976 series of policies are included within the definition of "old" policies for purposes of the proposed settlement. Specimen copies of the 1969 series policies are attached hereto as Exhibit A. Specimen copies of

the 1976 series of policies are attached hereto as Exhibit B. Both the 1969 series and 1976 series of policies described herein are "old policies" within the meaning of the Stipulation.

5. In 1979, Liberty National introduced a third series of policies (Plans 560 and 561) which were guaranteed renewable for the life of the named insured. The 1979 series of policies increased the daily hospital confinement benefit, and imposed lifetime monetary limits on other benefits. Since the 1979 series of policies contained a \$2,500.00 lifetime limit on radiation/chemotherapy benefits and a \$2,500.00 lifetime limit on prescription drug benefits, the 1979 series of policies is *not* included within the definition of "old" policies for purposes of this class action. However, persons insured under 1979 Series policies *were* allowed to exchange their policies for "new" policies under the alleged cancer exchange programs. (By contrast, persons who had incurred claims for internal cancer on any of the "old" policies or under the 1979 series policies were *not* eligible to exchange to "new" policies.) In addition, from 1979 through 1986, Liberty National also sold "Cancer Supplement" policies (Plans 562 and 563) which contained no benefits for radiation or chemotherapy but provided supplemental benefits in other categories, such that, when a "Cancer Supplement" policy was issued to the holder of one of the "old policies," the limits upon daily room benefits, for example, would be increased by a specified amount. The "Cancer Supplement" policies were designed primarily for issuance as an additional, supplemental policy to persons already insured under another

Liberty National policy. The "Cancer Supplement" policies are not included within the definition of "old policies" under the Settlement.

6. In 1982, Liberty National introduced Plans 564 and 565. These policies were guaranteed renewable for the lifetime of the insured. The 1982 series of policies provided benefits for hospital confinement expenses, surgical expenses, anesthetist benefits, attending physician expenses, and private duty nursing expenses, subject to certain daily or "per procedure" monetary limits on certain of said benefits. In addition, the 1982 series of policies (like the 1969 and 1976 series of "old" policies) provided full reimbursement to the named insured (or his assignee) for radiation, chemotherapy, and prescription drug expenses incurred in connection with a covered person's treatment of cancer, without monetary limits. The 1982 series of policies is included within the definition of "old" policies for purposes of this class action and for purposes of the proposed class action settlement. Complete specimen copies of each of the 1982 series policies is attached hereto as Exhibit C. Plans 564 and 565 were also referred to for some purposes as Forms 7022, 7023, 7024 and 7025.

7. All benefits under all of the "old" policies and "new" policies were payable to the named insured on the policy or the named insureds' assignee, regardless of which covered person under the policy received the cancer treatment. New sales of "old" policies ceased on or about August 29, 1986, but "old" policies sold prior to that date remained in force until and unless they were lapsed or exchanged by the named insured (or in the case



of "old" policies renewable to age 65, until the named insured reached age 65).

8. By 1986, Liberty National's agents were receiving customer complaints about the frequency and size of premium increases on the "old" policies which were rising in price cost due to inflation and the lack of any built-in safeguards against any providers who might be inclined to set their charges according to the amount of insurance available. At the same time, Liberty National's competitors were offering more and more products which had more monetary limits together with new and additional kinds of benefits which appeared to be less susceptible to inflation, maximization of fees by some providers, and resultant premium increases for every policyholder.

9. Consequently, on or about August 29, 1986, Liberty National introduced Plans 5GI, 5GJ, 5GK, 5GL, 5GM, and 5GN. Under these "new" policies (as defined in the stipulation), a host of new benefits never before offered by Liberty National cancer insurance policies were provided. For example, the 1986 series "new" policies offered a "first occurrence" benefit consisting of a \$2,000 cash payment to the named insured upon a covered person's first diagnosis of internal cancer, in addition to any other benefits payable. Moreover, the 1986 series of policies offered hospice care benefits not previously offered by any of the "old" policies; benefits for prostheses not previously offered by any of the old policies; an "income replacement benefit" of \$100 per week up to 26 weeks payable in the event a covered person was prevented from earning his normal income due to disability caused by cancer (a benefit never before offered by any Liberty National cancer policy); generally higher surgical benefits

and higher hospital confinement benefits, anesthetist benefits, attending physician expense benefits, and private duty nursing expense benefits than had ever been offered in any other Liberty National cancer insurance policy. In addition, for the first time ever, the 1986 series of policies provided certain hospital confinement benefits for the treatment of various "dreaded diseases" other than cancer, including cystic fibrosis, encephalitis, meningitis, sickle cell anemia, multiple sclerosis, muscular dystrophy, tuberculosis, and Lou Gehrig's disease, among others. The 1986 series "new" policies also provided coverage for radiation/chemotherapy treatment subject to a monetary limit of \$500 per day (with no maximum number of days), and coverage for prescription chemotherapy drugs up to \$8,000 per year, with no lifetime maximum. Coverage for non-cancer fighting prescription drugs prescribed in connection with cancer treatment (such as anti-nausea medication) was not provided under the "new" policies introduced in 1986. Specimen copies of the 1986 series of policies are attached hereto as Exhibit D.

10. In 1990, Liberty National introduced a second series of "new" policies (as defined in the Stipulation), including plans 5GR, 5GX, 5GS, 5GY, and 5GT, and 5GZ. These "new" policies were substantially similar to the 1986 series of "new" policies, except that they provided a higher first-occurrence benefit of \$2,250, together with higher benefits than provided by the 1986 series policies for hospice care, prosthesis, outpatient ambulatory surgical center care, hospital confinement expenses, anesthetist expenses, attending physician expenses, private duty nursing expenses, and prescription chemotherapy drugs,

and a higher maximum surgical benefit schedule. These 1990 "new" policies were marketed as the "Cancer Care Plus" series.

11. In addition to the "Cancer Care Plus" series of policies mentioned above, Liberty National also introduced in 1990 a series of "reduced benefit/reduced premium" versions of its 1990 series of policies. The benefits provided by each policy were generally similar, but with lower maximum limits and correspondingly lower premiums. These plans were marketed as the "senior cancer care" and "cancer care" policies, respectively, and were not eligible for treatment as an exchange for purposes of agent commissions during any of the alleged cancer exchange programs. The primary 1990 series of policies described in paragraph 10 above (Plans 5GR, 5GX, 5GS, 5GY, 5GT, and 5GZ) were marketed as the "Cancer Care Plus" policies. The "Cancer Care" and "Senior Cancer Care" policies were developed as a low-cost alternative to persons who desired one of the "new" policies but preferred lower benefits and lower premiums than offered by the "Cancer Care Plus" products. The "Cancer Care" product was essentially identical to the 1986 series of new policies, except that the "First Occurrence" benefit was \$1,000. The "Senior Cancer Care" policies also provided a \$1,000 "First Occurrence" benefit, and provided lower monetary limits for hospital confinement expenses, attending physician and private duty nursing expenses, radiation, chemotherapy, and prescription chemotherapy drugs, all at a much lower premium than the "Cancer Care plus" version of the 1990 series policy. Complete specimen copies of each of the 1990 series of "new"

policies described in paragraphs 10 and 11 of this affidavit are attached hereto as Exhibit E.

12. A chart summarizing the benefits provided by each of the 1969, 1976, 1982, 1986, and 1990 (Cancer Care Plus) series policies described above is attached hereto as Exhibit F. Persons insured under "old policies" (and persons insured under the 1979 series "limited" policies) were allowed to exchange their "old policies" (or their 1979 Series "limited" policies) for one of the "new policies" only if they had *not* suffered internal cancer prior to the exchange. An exchange to a "new policy" resulted in cancellation of her "old policy", but persons exchanging to a "new policy" had the option to keep any "cancer supplement."

13. As shown by Exhibit G attached hereto, during the entire period from August 29, 1986 through September 24, 1993, only 16 persons who have submitted cancer claims under the 1986 series policies have ever exceeded the \$8,000 annual monetary limits on prescription chemotherapy drugs under those policies; and only 9 cancer claimants have ever exceeded the \$10,000.00 annual monetary limits on prescription chemotherapy drugs under any of the 1990 "Cancer Care Plus" series of "new" policies described in paragraph 10 of this affidavit.

14. The 1982 series "old" policies provide the highest level of benefits of any of the "old" policies. As shown by the chart attached hereto as Exhibit H, from the inception of the 1982 series through December 31, 1986, approximately 73% of these policyholders who submitted cancer claims under the 1982 series "old" policies

received no radiation or chemotherapy treatment for their cancer whatsoever.

15. As shown in the chart attached hereto as Exhibit I, during the period from August 29, 1986 through September 24, 1993, approximately 65% of the "old" cancer policies on which initial claims were paid during that time period submitted no claims for radiation or chemotherapy treatments whatsoever. Moreover, this same chart shows that an additional 16.8% of all policyholders who submitted claims under "old" policies during this time period received radiation and chemotherapy treatment at a total charge by the providers of \$6,000 or less. In my opinion as an actuarial expert, and based upon my experience with the policies at issue and Liberty National's claims experience under those policies, it would be highly unlikely for any person who had radiation and chemotherapy charges which did not exceed \$6,000 to receive fewer total dollars in benefits under the "new" policy than under any of the "old" policies for that person's overall cancer treatment. I base this conclusion on the fact that, on average, the \$500.00 daily limits on radiation and chemotherapy under "new" policies is currently resulting in the payment of 68% of the aggregate radiation and chemotherapy treatment charges submitted (See paragraph 16 and Exhibit J). Thus, for a person who has \$6,000.00 in radiation and chemotherapy charges, the "new" policy can be expected to provide radiation and chemotherapy benefits at least in excess of \$4,000.00. Quite often, a person will have radiation claims of \$6,000 or less spread over 12 or more days, such that *all* radiation and chemotherapy treatments under the "new" policy may be within the \$500.00 daily limits. Nevertheless,

assuming that only 68% of any charge of \$6,000.00 for radiation and chemotherapy were paid by the "new" policies (see paragraph 16, below), the difference would be more than made up by the "first occurrence benefit" alone, a benefit which is provided by the "new" policies but not provided by the "old" policies. Therefore, I conclude to a reasonable degree of actuarial certainty that *in excess* of 82% of all cancer claimants would have received more total dollars under their "new" policy than would be received under an "old" policy for the same overall cancer treatment. The further analysis set forth below demonstrates that the actual percentage is likely much higher than 82%.

16. Attached hereto as Exhibit J is an analysis of incoming claims for radiation and chemotherapy treatments processed during an approximate two-month period during the third quarter of 1993. The analysis relates only to those incoming cancer claims that included claims for radiation or chemotherapy treatment. It demonstrates that approximately 68% of the total dollar amount of all radiation and chemotherapy charges currently being submitted would be paid under the \$500.00 limit. This Exhibit also shows that, during the sample period, claims were submitted for 5,945 days of radiation and chemotherapy treatment, with approximately 80% of those days representing treatments which were less than \$500.00. In my opinion as an actuarial expert, and based upon my experience with the policies at issue and Liberty National's claims experience under those policies, the shortfall in radiation and chemotherapy benefits which may result from the \$500.00 daily limits is *more* than offset in virtually all cases by the generally higher surgical



benefits and the higher hospital confinement, attending physician, and private duty nursing benefits under the "new" policies, and by the first occurrence benefit, income replacement benefits, prosthesis benefits, hospice care benefits, and other new benefits provided by the "new" policies that were not provided by any of the "old" policies.

17. In my opinion as an actuarial expert, and based upon my knowledge of the Liberty National policies involved and Liberty National's claims experience under the policies involved, the vast majority of persons who have radiation and chemotherapy claims in excess of \$6,000.00 would still receive more total dollars in benefits under the "new" policies than under any of the "old" policies for their overall cancer treatment. I base this opinion and conclusion upon the fact that the "new" policies contain higher hospital benefits, generally higher surgical benefits, higher attending physician benefits, higher anesthetist benefits, and higher private duty nursing benefits than the "old" policies, and upon the fact that the "new" policies contain prosthesis benefits, hospice benefits, and income replacement benefits not contained in the "old" policies, along with the "first occurrence" and other "new benefits" as shown on Exhibit F. Indeed, from my experience, persons who receive radiation and chemotherapy treatment in excess of \$6,000.00 often have lengthy hospital stays resulting in hundreds (or thousands) of dollars in additional hospitalization, surgical, attending physician, and private duty nursing benefits under the "new" policy in excess of what would have been provided under the "old" policy, and

hundreds (or thousands) more dollars in income replacement benefits under the "new" policy, in addition, of course, to the "first occurrence benefit." In short, in all but the most unusual cases, the dollar amount of "new" and higher benefits under the "new" policy that are actually paid increase as the amount of radiation or chemotherapy increases, resulting in the payment of more total dollars under the "new" policy than under the "old" policies in the vast majority of cases, despite the \$500.00 daily limits on radiation and chemotherapy and the absence of coverage under the "new" policies for non-chemotherapy prescription drugs. In my best judgment, an overwhelming majority of cancer claimants with more than \$6,000.00 in radiation and chemotherapy treatments would receive more total dollars under the "new" policies than would be received under any of the "old" policies for the same overall cancer treatment.

18. Attached hereto as Exhibit K is a model which I prepared indicating my analysis of the percentage of cancer claimants who have a reasonable likelihood of receiving more total dollars under the 1986 series "new" policies (which provided lower benefits than the 1990 series "new" policies) than under the "old" policies. This model analyzes 13,045 "old" policies on which initial claims were paid from January, 1986, through September, 1992. Those "old" policies on which claim payments were made for radiation, chemotherapy, and prescription drug treatments were arranged from the smallest dollar amounts of radiation, chemotherapy, and prescription drug treatment charges up through those policies with the largest dollar amount of such charges. The range of actual charges for radiation, chemotherapy, and prescription

drug treatment on the "old" policies was used to estimate the range of actual charges on 10,989 "new" exchanged policies on which initial claims were paid during the same time period of January, 1986, through September, 1992. The average of all benefits paid within each category on the "new" policies was compared to the average of all benefits paid under the corresponding category under the "old" policies. This comparison indicates that approximately 98% of all cancer claimants under "new" policies would probably have received more *total claim* dollars under the "new" policies than would have been received under the "old" policies for the same overall claims.

19. Attached hereto as Exhibit L is a display of average dollar amounts of claims paid, broken down between those policies on which there were no claims payable for radiation and chemotherapy benefits and those policies on which claims were payable for radiation and chemotherapy benefits. This data reveals that the 1986 series of "new" policies pays a greater average dollar amount of claims than does the "old" policies, both in those situations where radiation and chemotherapy treatments were used and on those claims where such treatments were not used.

20. The total number of old policies in force (or in the grace period) as of August 29, 1986 was 396,712; the total number of "old" policies in force as of September 24, 1993 was 46,600; the total number of "new" policies in force as of September 24, 1993 was 311,857; the total number of "new" policies (including new issues and exchange plans) on which claims have been paid through

September 24, 1993 was 29,802; the total dollars in benefits that had been paid out under "new" policies since August 29, 1986 was \$183,811,276.42, as of September 24, 1993; and the approximate number of "old" policies which were exchanged for "new" policies according to Liberty National's records since August 29, 1986 is 206,255.

21. Based upon my experience and qualifications as an actuary, and my knowledge of Liberty National's various cancer policies and Liberty National's claims experience under those policies, it is my best judgment that the number of class members who submitted claims for internal cancer under 1986 series exchanged policies and received *fewer* total dollars in benefits under "new" policies than would have been received for the same treatment under the applicable "old" policies is approximately 200 to 240. This represents approximately 2% of the claimants under the 1986 series exchanged policies. In my best judgment, approximately 70 to 110 class members who submitted claims for internal cancer under 1990 series exchanged policies would have received fewer total dollars in benefits under their "new policy" than would have been received for the same treatment under their "old policy." However, there is no way to calculate an exact number of persons who received fewer total dollars under "new" policies than would have been received for the same cancer treatment under the applicable "old" policies, without reprocessing every cancer claim ever submitted under a "new" policy by hand, through manual review of claims records, hospital records, provider records, and the like, together with manual calculations of the benefits that would have been

paid under the applicable "old" policy as compared with the actual benefits paid under the applicable "new" policy for each claimant. The necessary information to make these calculations is not contained in any of Liberty National's computer records, but is stored in paper records consisting of the claims information actually submitted by the claimant at the time of the claim. This claims information is stored in chronological order by the date the claim was processed, and *not* in alphabetical order by the name of the claimant. To manually determine the exact number of cancer claimants who received fewer dollars in benefits under their applicable "new" policies than would have been received under the applicable "old" policies for the same overall cancer treatment, through manual comparison for each claimant who ever submitted a claim under the "new" policies, would literally take years to complete. The estimates stated herein have no role in determining actual eligibility to share in the monetary settlement pools created by the Settlement. The Proof of Claim procedure established by the Court will determine the exact number of persons eligible to share in those monetary pools.

22. Liberty National has not implemented a premium increase for "old" policies or "new" policies during 1993 because of the pendency of this class action proceeding and the publicity surrounding it. However, in my opinion as an actuarial expert, rate increases are justified and could have been implemented on June 1, 1993 based upon the current loss ratios. If the class action settlement is approved, no premium increase can be implemented on "old" or "new" policies before January 1, 1995. By this time, in my opinion as an actuarial expert, the actuarially

justifiable premium increase for many of the policies will be such that any premium increase will have to be "phased in" over time in order to avoid an inordinately high rate of policy terminations by insureds as a result of premium increases.

23. Attached hereto as Exhibit M are my calculations of the cost to Liberty National of implementing the proposed settlement now under consideration by the Court. Based upon the calculations shown in Exhibit M, I estimate the total cost to Liberty National of implementing the proposed settlement, assuming the settlement is approved and takes effect, to be in the range of \$33.9 million to \$49.9 million, based upon my best judgment.

24. Attached hereto as Exhibit N is a chart showing the dates of inception of claims under the 1986 series of "new" policies.

25. Liberty National makes a significant contribution to the economy of the State of Alabama. Liberty National has in excess of 1,500 full-time employees (including agents) in the State of Alabama who are dependent on the Company for their livelihood, and in excess of 3,400 such employees overall. In calendar year 1992, the total compensation paid to Liberty National employees (including agents) in the State of Alabama was approximately \$67.5 million. Liberty National paid premium taxes, real estate taxes, Guaranty Fund assessments, and other taxes in the State of Alabama in 1992 in an aggregate amount of more than \$3.6 million. The amounts withheld from the pay checks of the company's



employees in the State of Alabama to pay state withholding taxes and various city and county occupational taxes amounted to approximately \$2.7 million in 1992.

26. Attached hereto as Exhibit O is a chart displaying Liberty National's estimated net earnings from its cancer line of insurance for the years 1987 through 1992 determined on a basis consistent with that used for reporting to shareholders. The aggregate net earnings in this six year period is approximately \$47 million, or average earnings of approximately \$8 million per year. The net earnings displayed are the aggregate net earnings for the entire cancer line of business including all of the policies encompassed by the class action as well as a substantial block of cancer business which is not at issue in this litigation. There are approximately 400,000 past and present policyholders (plus their insured family members) who are class members. The aggregate net earnings derived by the company during the referenced six year period amounts to less than \$125 per policyholder in the class.

27. Attached hereto as Exhibit P is the cover page and balance sheet from Liberty National's statutory financial statements for the year ended December 31, 1992 as reported to the Insurance Department of the State of Alabama and the other jurisdictions where Liberty National is licensed to conduct the business of insurance. The total capital and surplus of Liberty National Life Insurance Company as shown on Line 37 of the page entitled "Liabilities, Surplus and Other Funds" as of December 31, 1992 was \$326,802,539. While this capital and surplus (i.e., statutory net worth) would be

exhausted and exceeded if one were to assume a monetary award of \$1,000.00 for each class member (or if one were to assume a succession of \$1,000,000.00 punitive damage awards to 327 individual class members), I do not believe that the capital and surplus of the company is truly in danger of being exhausted in that the "new" policies are better than the "old" policies, and it is my belief that Liberty National will not ultimately be found liable by the Alabama Supreme Court for the damage claims asserted by individual class members.

28. Further deponent sayeth not.

/s/ Anthony L. McWhorter  
Anthony L. McWhorter

Sworn to and subscribed before this 13 day of  
December, 1993.

/s/ Mary M. May  
Notary Public

My Commission Expires 11-6-95

[SEAL]

## SUMMARY OF MAJOR BENEFITS UNDER VARIOUS LIBERTY NATIONAL CANCER POLICIES

## EXHIBIT E

581

	OLD Policy (1969 Series) <sup>1</sup>	OLD Policy (1976 Series) <sup>2</sup>	OLD Policy (1982 Series) <sup>3</sup>	NEW Policy (1986 Series) <sup>4</sup>	NEW Policy (1990 Series) <sup>5</sup>
Renewable to	Age 65	For life	For life	For life	For life
First Occurrence Cash Payment for 1st cancer diag.	NONE	NONE	NONE	\$2,000	\$2,250
Hospice care	NOT COVERED	NOT COVERED	NOT COVERED	\$50/day	\$75/day
Prosthesis	NOT COVERED	NOT COVERED	NOT COVERED	\$500 each (2)	\$750 each (2)
Income Replacement Benefit	NONE	NONE	NONE	\$100/week (26 weeks)	\$100/week (26 weeks)
Dread Disease Benefits <sup>6</sup>	NO	NO	NO	YES	YES
Outpatient Ambulatory Surg Center	\$100/day	\$100/day	\$100/day	\$100/day	\$150/day
Hospital Confinement	\$30/day	\$30/day	\$60/day	\$100/day for 1st 90 days, then \$250/day	\$150/day for 1st 90 days, then \$400/day
Surgical Benefit Up To:	\$400 per op.	\$400 per op.	\$800 per op.	\$1,000 per op.	\$2,000 per op.
Anesthetist Benefit Up To:	\$75 per op.	\$75 per op.	\$100 per op.	25% of surg. ben.	25% of surg. ben.
Attending Physician	\$10/day	\$10/day	\$15/day	\$25/day	\$35/day
Private Duty Nurse Expense	\$25/day	\$25/day	\$30/day	\$50/day	\$75/day
Radiation and chemotherapy	100% (no max)	100% (no max)	100% (no max)	Up to \$500/day (no max. days)	Up to \$500/day (no max. days)
Prescription Chemotherapy Drugs	100% (no max)	100% (no max)	100% (no max)	Up to \$8,000 per year, no lifetime max	Up to \$10,000 per year, no lifetime max
Non-chemo- therapy prescrip- tion drugs <sup>7</sup>	100% (no max)	100% (no max)	100% (no max)	NOT COVERED	NOT COVERED
Blood (excluding lab charges)	100% (no max)	100% (no max)	100% (no max)	100% (no max)	100% (no max)
Additional Benefits	\$100/hosp. admission; transportation	\$100/hosp. admission; transportation	Transportation	Gov't hosp. benefit; transportation	Gov't hosp. benefit; transportation

<sup>1</sup> Plans 505 (Family) and 506 (Single Parent)<sup>2</sup> Plans 509 (Family) and 510 (Single Parent)<sup>3</sup> Plans 564 (Single Parent) and 565 (Family)<sup>4</sup> Plans 501/SGL (Individual), 5 GJ/SGM (Family), 5GK/SGN (Single Parent)<sup>5</sup> Plans 50R/SOX (Individual), 5 OS/SOY (Family), and 5 OT/SGZ (Single Parent)

<sup>6</sup> Dread Disease Benefit provides the applicable hospital room benefits for the following diseases (other than cancer): Cystic Fibrosis, Diphtheria, Encephalitis, Lou Gehrig's Disease, Meningitis, Multiple Sclerosis, Muscular Dystrophy, Osteomyelitis, Poliomyelitis, Rabies, Scarlet Fever, Sickle Cell Anemia, Small Pox, Tetanus, Tuberculosis, Tularemia, and Typhoid Fever. Only the "new policies" offer this benefit.

IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK	)	CONFIDENTIAL
ROBERTSON, individually and	)	
on behalf of a class	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	CV-92-021
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	CONFIDENTIAL
Defendant.	)	
STATE OF ALABAMA	)	
COUNTY OF JEFFERSON	)	

REBUTTAL AFFIDAVIT OF  
ANTHONY L. MCWHORTER

Before me, the undersigned notary public in and for said county and said state, personally appeared Anthony McWhorter, who being by me first duly sworn, deposes and says as follows:

1. My name is Anthony McWhorter. My education, experience, and employment information is accurately set forth in my previous affidavits.

2. Based upon presently available year-end financial information pertaining to Liberty National Life Insurance Company, the estimated net earnings of Liberty National Life Insurance Company from *all* cancer insurance products (including policies outside the class and insureds outside the class) during 1993 was approximately \$4.4



million. This brings the total estimated net earnings of Liberty National Life Insurance Company on *all cancer products* (not just class members' policies) for the years 1987 through 1993, inclusive, to an aggregate total of approximately \$51.3 million. These figures are accurate based upon my best judgment. Liberty National does not keep precise separate totals of its earnings from cancer products, but Liberty National does keep exact information as to its overall earnings from all lines of business combined. The above estimates of net earnings have been derived by utilizing the actual gross premiums from all cancer products, and then allocating to the cancer line of business a percentage of the overall expenses of the company as a whole – namely, the percentage that is equivalent to the proportion of (a) total premiums from cancer products to (b) total premiums received from all products. In addition, the above estimates include an allocation of investment income to the cancer line of business based upon the actual policy reserves held on account of the entire cancer line of business, and the company's overall net rate of return on its investments.

3. The aggregate estimated net earnings reflected above are *not limited to earnings from the cancer policies of class members*. Included in these aggregate totals are earnings derived from a very large number of persons who never purchased any cancer policy from Liberty National until after 1986 (and who therefore would not be members of the class and would not have been affected by the cancer exchange program). Also included in these aggregate net earnings are the earnings derived from the 1979 series policies, which are not included within the definition of "old policies" or "new policies" for purposes of the

class action. Also included in these net earning figures are the earnings derived from "cancer supplement policies" which do not fit the definition of "old policies" or "new policies" under the settlement. Also included in these aggregate figures are earnings derived from the cancer policies of persons who may have once owned an "old policy" prior to August 29, 1986, but did not have that "old policy" in force or in the grace period on August 29, 1986, and who thereafter purchased a "new policy". Such persons would not be class members under the terms of the class definition. Also included in these net earnings figures are earnings derived from persons who never owned a "new policy." Finally, these net earnings include approximately \$52.3 million in aggregate gross investment income (or \$34.0 million in after-tax investment income) from the investments of Liberty National Life Insurance Company.

4. Since August 29, 1986, approximately 206,255 old policies were formally exchanged for "new policies". By contrast, approximately 426,312 new policies were issued on a "new issue" basis, almost all of which would have been issued to persons who are not in the class.

5. In my best judgment, only approximately 40.5% of the aggregate cancer premium income of Liberty National Life Insurance Company for the years 1987 through 1993 is attributable to "exchanged" policies. This represents more than just premiums attributable to the new policies of class members, since it would include premiums received under a policy exchanged from a previous policy that was not within the definition of an "old policy" – e.g., where the exchange was made from a

1979 series policy containing limits on radiation and chemotherapy. Since Liberty National Life Insurance Company seeks to achieve generally similar profit margins on all of its cancer plans over the lifetime of that plan, it is fair to approximate the net earnings of a sub-group of business within the cancer line based upon the premium income of that sub-group. Furthermore, the calculation of net earnings on sub-groups within the cancer line of business would be a very complicated, arduous, and time-consuming task if a more refined approach were taken. Given the time constraints involved, I believe my approach of relating net earnings to premiums is reasonable and yields a result that reasonably approximates the result that would be obtained from a more refined and detailed methodology.

6. Based on the foregoing, in my best judgment, only approximately 40.5% of the aggregate net earnings of Liberty National Life Insurance Company from its cancer products for the years 1987 through 1993 are attributable to exchanged policies. This means that approximately \$20.4 million in net earnings are attributable to the exchanged policies. Moreover, it would not be accurate to say that all of this amount represents Liberty National's "profit from the cancer exchange program." For example, for persons who exchanged to the "new policy", much of the premium income received from those persons would have been received *even if the exchange had not taken place* - e.g., the premiums on the class members' "old policies" would have been received if there had been no exchange, and this would offset much of the premiums actually received on exchanged policies. *Even assuming that only 60% of the total premiums*

*actually received on the exchanged policies would have been received anyway if the old policies had not been exchanged, then the net earnings attributable to "the exchange program" would be reduced to approximately \$8.2 million.* Therefore, most of the earnings derived from class members' policies since 1986 cannot fairly be deemed "profit from the cancer exchange program." Nevertheless, even utilizing the total estimated aggregate net earnings on all exchanged policies since 1986 (\$20.4 million), the cost of the proposed settlement to Liberty National already *substantially exceeds* any and all profit that could possibly have been derived from Liberty National Life Insurance Company from the exchanged policies of class members, much less as a result of the cancer exchange program.

7. Although the earnings derived from the old policies of class members do not represent "profit from the cancer exchange programs," approximately 22.5% of the \$51.3 million in aggregate net earnings on *all cancer products* referenced above (or \$12.7 million) are attributable to the "old policies" of class members. Even if 100% of the net earnings on all class members "old policies" are added to 100% of the *total* net earnings on class members' exchanged policies, the total estimated net earnings figure that results (\$33.1 million) is still substantially *exceeded* by the costs of the proposed settlement.

8. Liberty National Life Insurance Company implements premium increases for all customers in all states based upon the criteria used by the most restrictive state regulatory agency in which Liberty National Life Insurance Company does business. The State of Florida, for example, utilizes strict criteria and must approve all rate increases through its Department of Insurance. It is my



understanding that the State of Alabama, on the other hand, reserves an inherent and broad discretionary power to disapprove or rescind a rate increase that is judged contrary to public policy. Moreover, in justifying a rate increase, Liberty National cannot go below what is known in the industry (and in the insurance regulations of many states) as a "minimum acceptable loss ratio" in computing a requested rate increase. Therefore, Liberty National cannot and will not recover the costs of the \$1 million and \$3 million pools; cannot and will not recover the cost of attorneys' fees paid to class counsel under the settlement; and cannot and will not recover the cost of restitution by means of future premium increases. Liberty National will, however, attempt to achieve or approach the minimum acceptable loss ratio permitted by the most restrictive state regulatory agency among the states in which it does business. While Liberty National will use the claims and premium experience of class members, consistent with the pooling concepts embodied in the Settlement Agreement, in computing loss ratios and future requested premium increases, Liberty National *cannot and will not go below the minimum acceptable loss ratios* in computing future rate increases or requests for rate increases. In my opinion as an actuary, *only by going below the minimum acceptable loss ratios* could Liberty National recover the cost of premiums lost by virtue of the court-ordered premium freeze or other costs of this settlement by means of future premium increases.

9. All items of income attributable to the entire cancer line of business are taken into account in the aggregate net earnings figures set forth herein and in the

aggregate net earnings figures contained in my prior affidavits.

10. Liberty National establishes policy reserves for its cancer line of business as required by the applicable statutory laws and regulations of Alabama and the various other jurisdictions where it is licensed to conduct the business of insurance. The policy contracts themselves make no reference to reserves, nor do the cancer policyholders have an equity or "cash value" in their policies such as exists in individual life insurance contracts. Cancer policy reserves are established in accordance with applicable law to assure that adequate funds are available to meet the company's financial obligation to make timely claim payments. The policy reserve on a specific cancer policy is not released merely by the payment of claims on that policy, even if hundreds of thousands of dollars are paid out on that specific policy. The reserves relating to a specific policy are released only upon the termination of that policy, regardless of the reason for the termination. The release of the policy reserve when a cancer policy terminates serves to reduce the loss ratio computed on the plan of insurance to which that policy belongs, thereby reducing the potential for subsequent premium increases on that policy group.

11. I was present during the trial of *Edith McAllister v. Liberty National*. I personally heard Mr. Norman Wal-drop, in closing argument, ask the jury to "punish" Liberty National not only for Edith McAllister, but for effects of the cancer-exchange program upon "the thousands of other Edith McAllisters" affected by the cancer exchange program, to the best of my recollection.



Further deponent sayeth not.

/s/ Anthony L. McWhorter  
Affiant

Sworn to and subscribed before  
this 26th day of January, 1994.

/s/ Linda H. Halsomback  
Notary Public  
[SEAL]

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IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of a	)	
class,	)	CIVIL ACTION
	)	NO. CV-92-021
Plaintiffs,	)	
v.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant.	)	

AFFIDAVIT OF THOMAS E. HAMBY

STATE OF ALABAMA )

COUNTY OF JEFFERSON )

Before me, the undersigned notary public in and for said county and said state, personally appeared Thomas E. Hamby, who being known to me and having been first duly sworn, deposes and says as follows:

1. My name is Thomas E. Hamby. I am Vice President - Policy Benefits of Liberty National Life Insurance Company ("Liberty National", and have held that position since 1991. Before that, I was Second Vice President - Policy Benefits, and I have been employed by Liberty National since 1968. I have personal knowledge of (and access to business records of Liberty National concerning) the matters set forth in this affidavit, and, subject to

any inadvertent, undiscovered or typographical errors or omissions, the documents attached hereto accurately summarize the matters they purport to show based upon information obtained from the business records of Liberty National, to the best of my knowledge, information and belief. The claims information submitted by each insured identified herein is too voluminous to attach to this affidavit, but will be made available for review by the Court and others upon request (subject to the protective order heretofore entered by the Court) at the Fairness Hearing.

2. I (and other Liberty National claims personnel working under my supervision) have reviewed the past benefit claims submitted by each of the following persons under their Liberty National cancer insurance policies:

Willard Price  
 Theda S. Enfinger (Thomas E. Enfinger, patient)  
 Betty P. Connell  
 Grace Taylor  
 Albert Adams  
 Robert J. Baggett (Jane S. Baggett, patient)  
 Joseph Broadus  
 Pamela Davis (Stanfield) – (Scott L. Davis,  
     dependent, patient)  
 Janice Lane  
 Francis McDonald  
 Edith White  
 Brenda Havard  
 Edward Moon  
 Ira Minyard  
 Nell E. Dismukes  
 John Hawsey, Jr.  
 Norris Woodard  
 Talmadge Allen

Norma Perkins  
 Bernard Perkins  
 Alpheus Curtis

It is my understanding that these persons have intervened in this lawsuit, filed objections in this lawsuit, or filed separate actions after March 10, 1993, and that each of them have stated or suggested (in pleadings or on the face of their objections heretofore submitted to the Court in the above-styled action) that they suffered cancer during the period their "new policies" (as that term is defined in the Stipulation and Agreement of Compromise and Settlement) were in force. While some of these persons may not yet have submitted Proof of Claim Forms, I (and persons working under my supervision) have reviewed the benefit claims and documentation originally submitted by each of the foregoing persons at the time of their cancer treatment, as well as the records of Liberty National's payment of benefits on those claims, for the purpose of determining which of them are class members who submitted cancer claims under new policies and received fewer total dollars in benefits under their new policies than would have been received had those same claims been submitted under each individual's "old policy" (as that term is defined in the Stipulation). Complete copies of the claims information submitted to Liberty National by each of the foregoing individuals will be made available for review by the Court and counsel for class members (subject to execution of the protective order heretofore entered by the Court), but the data is too voluminous to attach to this affidavit. The charts attached hereto accurately summarize and reflect the comparison they purport to show with regard to each of the persons

referenced in the charts, to the best of my knowledge and belief. According to Liberty National's records, only 3 of the 21 persons listed above are class members who received fewer dollars for cancer claims made under their "new policies" than would have been received had the same claims been submitted under their respective "old policies" – namely, Pamela Scott Davis (Stanfield), Edith White, and Brenda Havard.

3. As shown by the chart attached hereto as Exhibit A, Willard Price has (to date) received more total dollars under his "new policy" for the cancer treatment claims submitted than would have been received for those same claims under his previous "old policy." Specifically, Mr. Price has received benefits under his "new policy" totalling \$10,142.64, compared to \$6,103.79 which he would have received if those same claims had all been submitted under his "old policies."

4. As shown by the chart attached hereto as Exhibit B, Theda S. Enfinger and Thomas E. Enfinger have received more total dollars under their new policy for the cancer treatment claims submitted (on behalf of patient Thomas E. Enfinger) than would have been received for those same claims under their previous old policy. Specifically, the Enfinger received benefits under their "new policy" totalling \$10,397.40, compared to \$9,709.50 which they would have received if those same claims had all been submitted under their "old policy."

5. As shown by the chart attached hereto as Exhibit C, Betty Connell has (to date) received more total dollars under her new policy for the cancer treatment claims submitted than would have been received for those same

claims under her previous old policy. Specifically, Ms. Connell has received benefits under her "new policy" totalling \$24,451.82, compared to \$20,395.05 which she would have received if those same claims had all been submitted under her "old policy."

6. As shown by the chart attached hereto as Exhibit D, Albert Adams has (to date) received *more* total dollars under his new policy for the cancer treatment claims submitted than would have been received for those same claims under his previous old policy. Specifically, Mr. Adams has received benefits under his "new policy" totalling \$16,606.74, compared to \$6,593.00 which he would have received if those same claims had all been submitted under his "old policy."

7. As shown by the chart attached hereto as Exhibit E, Grace Taylor has (to date) received more total dollars under her new policy for the cancer treatment claims submitted than would have been received for those same claims under her previous old policy. Specifically, Ms. Taylor has received benefits under her "new policy" totalling \$3,827.50, compared to \$1,153.00 which she would have received if those same claims had all been submitted under her "old policy."

8. As shown by the chart attached hereto as Exhibit F, Robert J. Baggett III and Jane S. Baggett have (to date) received *more* total dollars under their new policy for the cancer treatment claims submitted by them (on behalf of patient Jane S. Baggett) than would have been received for those same claims under their previous old policy. Specifically, the Baggetts have received benefits under their "new policy" totalling \$7,435.00, compared to



\$3,363.00 they would have received if those same claims had all been submitted under their "old policy."

9. As shown by the chart attached hereto as Exhibit G, Joseph Broadus has (to date) received more total dollars under his new policy for the cancer treatment claims submitted than would have been received for those same claims under his previous old policy. Specifically, Mr. Broadus has received benefits under his "new policy" totalling \$13,823.61, compared to \$4,909.71 which he would have received if those same claims had all been submitted under his "old policy."

10. As shown by the chart attached hereto as Exhibit H, Janice Lane has (to date) received more total dollars under her new policy for the cancer treatment claims submitted than would have been received for those same claims under her previous old policy. Specifically, Ms. Lane has received benefits under her "new policy" totalling \$8,506.00, compared to \$6,082.12 which she would have received if those same claims had all been submitted under her "old policy."

11. As shown by the chart attached hereto as Exhibit I, Francis McDonald has (to date) received more total dollars under his new policy for the cancer treatment claims submitted than would have been received for those same claims under his previous old policy. Specifically, Jr. McDonald has received benefits under his new policy" totalling \$4,318.32, compared to \$1,018.00 which he would have received if those same claims had all been submitted under his "old policy."

12. As shown by the chart attached hereto as Exhibit J, Edward Moon has (to date) received *more* total

dollars under his new policy for the cancer treatment claims submitted than would have been received for those same claims under his previous old policy. Specifically, Mr. Moon has received benefits under his "new policy" totalling \$728.00, compared to \$307.00 which he would have received if those same claims had all been submitted under his "old policy."

13. As shown by the chart attached hereto as Exhibit K, Norris Woodward [sic] has (to date) received more total dollars under his new policy for the cancer treatment claims submitted than would have been received for those same claims under his previous old policy. Specifically, Mr. Woodard has received benefits under his "new policy" totalling \$19,885.86, compared to \$17,534.76 which he would have received if those same claims had all been submitted under his "old policy."

14. According to Liberty National's records, Talmadge Allen did have cancer claims under a "new policy." As shown by the chart attached hereto as Exhibit L, Mr. Allen received \$16,757.18 under his "new policy" for his cancer treatment, and would have received \$16,296.95 for that cancer treatment had the same claims been submitted under his "old policy."

15. Ira Minyard and Grace Minyard (and those insured under their policy) are not class members, because Mr. Minyard's pre-August 29, 1986 policy was a 1979 series policy which did *not* contain unlimited benefits for radiation and chemotherapy, but instead contains lifetime monetary limits of \$2,500.00 for radiation and chemotherapy. This 1979 series policy does not meet the definition of an "old policy" under the Stipulation and

the court's class certification order. Because of this, I have not undertaken to review Mr. Minyard's cancer claims, since he is not a class member.

16. Nell E. Dismukes is a class member, but she was never insured under a "new policy" as that term is defined in the Stipulation, to the best of my knowledge, information and belief, based upon my review of Liberty National records. While Neil E. Dismukes did have cancer claims, those cancer claims were submitted (and processed) under an "old policy." Therefore, I have not undertaken a comparison as to Ms. Dismukes' cancer claims.

17. Based upon available information, John Hawsey, Jr. never had the "new policy" as that term is defined in the Stipulation. Mr. Hawsey did have cancer claims, but those claims were made (and processed) under this "old policy." Therefore, I have to [sic] undertaken a comparison as to his claims.

18. As shown by the chart attached hereto as Exhibit M. Norma Perkins received more total dollars under her new policy for the cancer treatment claims submitted than would have been received for those same claims under her previous old policy. Specifically, Ms. Perkins received benefits under her "new policy" totalling \$41,191.82, compared to \$40,304.95 which she would have received if those same claims had all been submitted under her "old policy."

19. As shown by the chart attached hereto as Exhibit N, Bernard Perkins received more total dollars under his new policy for the cancer treatment claims submitted than would have been received for those same

claims under his previous old policy. Specifically, Jr. [sic] Perkins received benefits under his "new policy" totalling \$26,582.23, compared to \$24,308.36 which he would have received if those same claims had all been submitted under his "old policy."

20. As shown by the chart attached hereto as Exhibit O, Alpheus Curtis received more total dollars under her new policy for the cancer treatment claims submitted than would have been received for those same claims under her previous old policy. Specifically, Alpheus Curtis received benefits under the "new policy" totalling \$53,484.40, compared to \$28,417.85 which he would have received if those same claims had all been submitted under the applicable "old policy."

21. As shown by the chart attached hereto as Exhibit P, Pamela Davis (Stanfield) has (to date) received fewer total dollars under her new policy for the cancer treatment claims submitted (on behalf of patient Scott L. Davis) than would have been received for those same claims under her previous old policy. Specifically, Ms. Davis has received benefits under her "new policy" totalling \$16,996.25, compared to \$22,473.65 which she would have received if those same claims had all been submitted under her "old policy." In the course of reviewing Ms. Davis' claims, we discovered an error that had been made in processing her original claims under her new policy. Upon discovery of this error, Liberty National forwarded to Ms. Davis the additional amounts owing under her new policy, with interest, and those amounts (excluding interest) are included on the comparison attached as Exhibit P.



22. As shown by the chart attached hereto as Exhibit Q, Brenda Havard received fewer total dollars for the cancer claims she has submitted (to date) under her "new policy" than she would have received for those same claims under her previous "old policy." As of December 9, 1993, Mrs. Havard had received \$49,732.70 under "new policy" number 31079836, compared with \$59,501.40 she would have received had the same claims been submitted under her "old policy" number 4207425. Mrs. Havard's cancer treatment appears to be ongoing, and it remains at least possible that, depending on the nature of any future treatment, she could ultimately receive more total dollars under her new policy for her overall, completed course of treatment, particularly if any future treatment involves substantial hospitalization or surgery. It is also possible that the difference in total dollar amount of benefits between her old and new policy will be reduced as a result of any future treatment. In addition, according to Liberty National's records, Mrs. Havard has not yet submitted any claim for income replacement benefits under her new policy. If a valid claim for such benefits were submitted, any such benefits determined to be payable would increase the amounts paid under her new policy by \$100.00 for each week of income replacement benefits paid pursuant to the terms of her new policy, but would *not* increase the benefits that would have been paid under the old policy, since income replacement benefits were not provided under the old policy.

23. As shown by the chart attached hereto as Exhibit R, Edith White has received fewer total dollars for the cancer claims submitted under her new policy than

she would have received for those same claims under her previous "old" policy. As of the present time, Mrs. White has received \$15,938.60 under her "new" policy No. 31272896, compared with \$18,307.35 which she would have received had the same claims been submitted under her "old" policy No. 21253639.

24. Of the foregoing persons listed in paragraph 2 above, all but Edward Moon were, according to the claims documents submitted, covered by medicare or private major medical insurance at the time their cancer claims were submitted to Liberty National, in addition to being covered under a Liberty National cancer policy. Edward Moon may also be covered by other medical insurance, but that information does not affirmatively appear in Liberty National's claim records. For any person with major medical insurance covering the actual cost of cancer treatment incurred, the benefits paid under a Liberty National cancer policy for the same treatment would generally amount to cash money for the insured to spend as the insured sees fit.

25. Benefits under all Liberty National cancer policies are payable to the named insured (or his assignee) *in addition to* any benefits paid for the same treatment pursuant to any other insurance policy or under Medicare. However, all Liberty National cancer benefits are limited to actual or incurred charges to the insured (or the limits of the Liberty National policy, whichever is lower). Based upon my experience, it is an extremely low possibility that any person covered by Medicare at the time his cancer claims are submitted could receive fewer total dollars under a "new policy" than would have been received under an "old policy." This is because the



amounts which providers are allowed to charge Medicare patients for a given service, drug or treatment are strictly regulated and limited under Medicare. Medicare regulations prohibit participating providers from collecting *any* additional charges (over and above Medicare-approved charges) from the patient *or from any insurer of that patient*. Exhibit S attached hereto is a sample of a Medicare provider contract containing such a prohibition. Moreover, a *non-participating* provider is prohibited by Medicare from collecting more than 115% of Medicare-approved charges for treatment of a Medicare patient. Among other things, these facts tend to make it even more unlikely than otherwise that the *actual charge* to the Medicare patient for radiation or chemotherapy treatment would exceed (much less significantly exceed) the \$500.00 daily limit for any persons covered by Medicare. Many major medical insurers such as Blue Cross and Blue Shield of Alabama also impose limits upon actual provider charges pursuant to contracts between the insurer, the insured, and participating providers, and such limits under these types of private insurance plans would have a similar effect of limiting the actual charges incurred by the patient.

26. The Court has established a Proof of Claim procedure to determine eligibility to share in the two monetary settlement pools established by the June 16, 1993 Stipulation and Agreement of Compromise and Settlement, as amended ("the Stipulation"). A Proof of Claim Form approved by the Court was included in the Notice mailed to potential class members. Under the terms of the Stipulation and the instructions in the Proof of Claim Form, persons who answered "no" to one of the first four questions on the Proof of Claim Forms are *not* eligible to

share in either of the two monetary settlement pools. As shown by Exhibit T, as of November 30, 1993, Liberty National had received 1504 Proof of Claim Forms submitted by claimants who answered "no" to one of the first four questions.

27. The chart attached hereto as Exhibit U sets forth certain basic information determined thus far with respect to each of those 636 Proof of Claim Forms received by Liberty National on or before November 30, 1993 which contained "yes" answers to each of the first four questions on the Proof of Claim Forms. Claimants who answer yes to the first four questions of the Proof of Claim Form must still meet additional criteria in order to share in either of the \$1,000,000.00 or \$3,000,000.00 monetary settlement pools. To be eligible to share in the \$1,000,000.00 settlement pool, a claimant must, among other things, qualify as a class member; must accurately answer "yes" to the first four questions of the Proof of Claim Form; must submit the required supporting documentation with the Proof of Claim Form; must have replaced an "old policy" (as defined in the Stipulation) with a "new policy" (as defined in the Stipulation) within 30 days of lapsing the "old policy"; must have submitted claims for cancer benefits while the "new policy" was in force; must have incurred expenses for radiation, chemotherapy, prescription chemotherapy, or out-of-hospital prescription drugs which were not fully paid by Liberty National; and must submit a timely and proper Proof of Claim Form. To be eligible for the \$3,000,000.00 settlement pool, the claimant must meet all of the foregoing criteria *and* must have received fewer total benefit dollars under the "new policy" than would have been received

under the pertinent "old policy" for the same overall cancer treatment. Complete eligibility requirements are set forth in the Stipulation and the Proof of Claim Form.

28. The chart attached hereto as Exhibit V lists all of those class members who filed Proof of Claim Forms which could *potentially* meet the eligibility requirements to share in the \$1,000,000.00 pool, based upon Liberty National's review to date. The persons listed on Exhibit V are persons who submitted Proof of Claim Forms, answered "yes" to the first four questions on the Proof of Claim Form, had an "old policy" in force or in the grace period on or after August 29, 1986, and later switched to the new policy and had claims under the new policy. Some, but not all, of the persons listed on Exhibit V will also share in the \$3,000,000.00 pool. Persons listed on Exhibit V will share in the \$3,000,000.00 pool only if they are determined to have received fewer total dollars under their "new policies" than would have been received under their "old policies" for the same overall cancer treatment, and only if they meet all other eligibility requirements as well. With respect to Proof of Claim Forms received by Liberty National on or before November 30, 1993 (Exhibits T and U), claimants who are *not* listed on Exhibit V have been determined *not* to be eligible for either of the two monetary settlement pools, based upon the information reviewed by Liberty National.

29. The Proof of Claim Form contained in the class action notice in the above-styled action includes instructions that it is only to be returned by class members who had suffered cancer *and* had submitted claims for radiation, chemotherapy, prescription chemotherapy, out-of-hospital or prescription drugs that were not fully paid by

Liberty National. Therefore, one would expect the group of persons submitting Proof of Claim Forms to contain a higher proportion of claimants with radiation and chemotherapy treatment, and a higher proportion of claimants who received fewer dollars under their new policy, than the proportion for cancer claimants generally. Initially, Proof of Claim Forms were processed based upon order of receipt, but Liberty National is now concentrating on processing the Proof of Claim Forms of persons with radiation and chemotherapy first, since they are alleged to be the most likely to have received *fewer* benefit dollars under their "new policies" than would have been received under an "old policy" for the same cancer treatment. It is extremely unlikely that any person who suffered internal cancer and made claims under a "new policy" (but did not receive radiation or chemotherapy of any kind) would have received fewer total dollars under his "new policy" than would have been received under the "old policy" for the same treatment, since the First Occurrence benefit of the "new policy" alone would virtually assure that the "new policy" would produce more total benefit dollars to each such claimant, and since the daily limits under the "new policy" on radiation and chemotherapy would not come into play for such persons. Only the "new policy" contained a First Occurrence benefit. Of the 410 class members listed on Exhibit V, 322 had radiation and chemotherapy claims under a new policy.

30. A total of 107 of the 410 potentially eligible Proof of Claim Forms listed in Exhibit V have been fully analyzed thus far. Collective Exhibit W attached hereto shows that of the 107 claimants for whom analyses or



comparisons have been completed, 72 received *more total* dollars under their new policy than would have been received under the previous old policy for the same overall cancer treatment, and only 25 received *fewer total* dollars under their new policy, according to the information submitted with the Proof of Claim Form and with the original claims of each claimant. An additional 10 of these 107 Claimants shown in collective Exhibit W did not require a comparison, because they received no radiation, chemotherapy, prescription chemotherapy or out-of-hospital prescription drugs for their cancer treatment. Under the terms of the Settlement, persons who did not have any radiation, chemotherapy, prescription chemotherapy, or out-of-hospital prescription drugs as part of their cancer treatment are not eligible for restitution, nor are they eligible to share in either of the two settlement pools. (Most of the Proof of Claim Forms for which comparisons have been completed pertain to claimants who had radiation and chemotherapy treatment, since Liberty National decided to begin concentrating on that group of claimants first, for the reasons stated in paragraph 29, above). Collective Exhibit W also shows (for each claimant) the number of days of radiation/chemotherapy treatment exceeding \$500 per day, and the number of days of radiation/chemotherapy treatment which did not exceed \$500 per day. For example, Collective Exhibit W shows that claimant Thomas P. Plunkett has 555 days of chemotherapy treatment *under* the \$500.00 daily limit of his new policy, and only 1 day of chemotherapy treatment in excess of \$500.00. Similarly, Collective Exhibit W shows that Jessie Arnold had 222 days of chemotherapy treatment *under* the \$500.00 daily limit of the new policy, and

only 1 day of chemotherapy treatment over \$500.00. For the entire group of 107 claimants reflected in Collective Exhibit W, there were only 523 days of radiation and chemotherapy for which the actual charge *exceeded* the applicable \$500.00 daily limit of the new policy, and 4141 days of radiation and chemotherapy treatment for which the actual charge was *less than* \$500.00 per day. (In addition, there were only 20 days of radiation and chemotherapy treatment which exceeded the applicable \$250.00 daily limits of a claimant's Senior Cancer Care policy, compared to 56 days *under* that applicable \$250.00 limit).

31. As shown by Exhibit V, as of November 30, 1993, 410 claimants submitted Proof of Claim Forms which are *potentially* eligible for one or both of the monetary settlement pools. Thus far, 107 of those 410 Proof of Claim Forms have been fully analyzed or processed, and only 25 of those 107 (or approximately 23.36%) represent class members who had claims for radiation, chemotherapy, prescription chemotherapy, or out-of-hospital prescription drugs, but received *fewer total* dollars under their "new policies" than would have been received under their "old policies" for the same overall cancer treatment. Thus, to date, only 25 claimants are known for certain to be eligible for *both* the \$3,000,000.00 and \$1,000,000.00 monetary pools under the settlement, with 107 of 410 *potentially* eligible Proof of Claim Forms having been fully processed. If, as expected, this percentage drops (or, at most, remains consistent) as the remaining Proof of Claim Forms are analyzed or processed, it may be expected that *no more than* 96 (23.36% of 410) of the class members listed on Exhibit V will be eligible to share in the \$3,000,000.00 settlement pool, and probably less



than that number (for the reasons set forth in paragraph 29, above). All who qualify for the \$3,000,000.00 settlement pool will also share in the \$1,000,000.00 settlement pool, *and* receive 100% restitution of the actual difference in total benefits under their old and new policies. The number of claimants eligible to share in the \$3,000,000.00 pool may increase slightly as a result of Proof of Claim Forms received by Liberty National after November 30, 1993 but before the December 20, 1993 deadline for submission of Proof of Claim Forms.

32. Persons listed on Exhibit V who received *more* total dollars under their new policy – but nevertheless exceeded a daily limit under their new policy for radiation or chemotherapy, exceeded an annual limit on prescription chemotherapy under the new policy, or incurred expenses for non-cancer-fighting out-of-hospital prescription drugs in connection with their cancer treatment – are still *potentially* eligible to share in the \$1,000,000.00 settlement pool, but *not* the \$3,000,000.00 settlement pool. Not all of the persons listed on Exhibit V will in fact prove eligible for *either* of the monetary settlement pools. It is likely, for example, that some of the 410 claimants listed on Exhibit V received no radiation, chemotherapy, prescription chemotherapy, or out-of-hospital prescription drugs for their cancer (or received full reimbursement under the new policy for any such treatment they did receive), and are therefore not eligible to share in either of the two settlement pools. Indeed, of the 107 Proof of Claim Forms that have been fully processed, 10 claimants had received no radiation, chemotherapy, prescription chemotherapy or out-of-hospital prescription drugs for their cancer. (See Exhibit W). Nevertheless, of those class

members who filed timely and proper Proof of Claim Forms which were received by Liberty National on or before November 30, 1993 (Exhibits T and U), *no more than* the 410 claimants listed on Exhibit V are even *potentially* eligible for the \$1,000,000.00 pool. These numbers could vary somewhat as a result of any additional timely and proper Proof of Claim Forms received by Liberty National between November 30, 1993 and the December 20, 1993 deadline for submission of Proof of Claim Forms.

33. In order to determine whether a claimant received more total dollars in benefits under a new policy for the claims actually submitted under that new policy (compared to the total dollars in benefits that would have been received for the same claims under the claimant's previous old policy), all claims documentation submitted with the Proof of Claim form is reviewed, together with certain Liberty National records concerning the claimant's original claims for benefits under the new policy, and Liberty National records concerning Liberty National's benefit payments on the original claims. The original claims documentation submitted to Liberty National by the claimant is stored in paper records, in microfilm, or in microfiche, and is stored according to the date each claim was processed by Liberty National (not by the individual's name). The date claims were processed, the amount of benefits actually paid, and certain data regarding any claims not covered by the new policy in question are stored by computer, and that information is accessible by the insured's full name, date of birth, and policy number. The full amount of (and other critical details concerning) the original claims submitted or

charges incurred cannot be determined from the computer records, but only from the chronological claims files and the information submitted with the Proof of Claim Form. It takes as much as 25 working-hours to review each Proof of Claim form and attached documentation, locate the original claims documentation, and manually calculate whether the claimant would have received greater total benefits under the applicable old policy for claims actually submitted under a new policy. Each separate category of benefits must be separately calculated in order to make this determination. The same personnel responsible for processing incoming cancer claims in the ordinary course of business are needed to process Proof of Claim Forms. Absent the Proof of Claim Form procedures established by this Court pursuant to the Settlement, it would literally take years to complete such an analysis and comparison for every person who has ever submitted a claim for cancer benefits under a "new policy." Even with the Proof of Claim procedure, the process is still extremely time-consuming.

34. In supervising the processing of Liberty National's cancer claims in the ordinary course of business, it has been my experience that approximately two out of three cancer claimants do not receive (and make no claims for) any radiation or chemotherapy treatment whatsoever.

35. Based upon my experience in handling claims under Liberty National cancer policies, it is and always has been my belief and best judgment that the "new policies" result in the payment of more total dollars in benefits to the vast majority of insureds who actually suffer cancer, because of the "first occurrence," income

replacement, prosthesis, and hospice benefits under the new policies which were not provided under the old policies, and because of the higher hospital confinement benefits, attending physicians' benefits, nurse benefits, anesthetist benefits and generally higher surgical benefits under the new policies (among other new or higher benefits). In my best judgment, in the vast majority of cases, these new and higher benefits under the new policies more than offset the effect (if any) of the daily monetary limits under the new policies for radiation and chemotherapy, the annual limits on prescription chemotherapy drugs under the new policies, and the absence of coverage under the new policies for non-chemotherapy prescription drugs administered outside the hospital.

36. Review, verification and processing of Proof of Claim Forms is ongoing, and the deadline for submission of Proof of Claim Forms is December 20, 1993. This affidavit will be supplemented to reflect the results of additional timely and proper Proof of Claim Forms received after November 30 or processed between now and the January 20, 1994 Fairness Hearing, and to reflect any changes resulting from development or discovery of further pertinent information.

37. In addition to cancer claims which preceded the filing of a claimant's Proof of Claim Form, the benefit comparisons reflected in this affidavit currently include any additional claims for benefits received and processed by Liberty National in the ordinary course of business between the date the claimants' Proof of Claim Form was submitted and December 9, 1993. For any class member who submits a Proof of Claim Form, and thereafter submits additional claims for benefits under his or her new



cancer policy after filing a Proof of Claim Form but before December 20, 1993, the pertinent analysis will ultimately be updated by Liberty National to take into account all cancer claims filed by that claimant under the new policy through December 20, 1993.

Further deponent sayeth not.

/s/ Thomas E. Hamby  
Thomas E. Hamby, Affiant

Sworn to and subscribed before me this  
the 14th day of December, 1993.

/s/ Betsy P. Collins  
Notary Public

My commission expires: 7-26-94

[SEAL]

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IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	CONFIDENTIAL
individually and on behalf of	)	
a class,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. CV-92-021
v.	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

SUPPLEMENTAL AFFIDAVIT OF THOMAS E. HAMBY

STATE OF ALABAMA )

VOL I

COUNTY OF JEFFERSON )

Before me, the undersigned notary public in and for said county and said state, personally appeared Thomas E. Hamby, who being known to me and having been first duly sworn, deposes and says as follows:

1. My name is Thomas E. Hamby. I have previously filed an affidavit in the above-referenced action, and that affidavit was filed with the Court on or about December 15, 1993 ("original affidavit"). The purpose of this supplemental affidavit is to update my original affidavit to reflect information regarding additional Proof of Claim Forms that have been received or processed since my original affidavit was filed, and to reflect additions and adjustments, as well as correction of certain omissions



and errors in charts attached as Collective Exhibit W to my original affidavit.

2. Since my original affidavit was filed, the December 20, 1993 deadline for filing Proof of Claim Forms has expired. As of January 10, 1994 Liberty National had received a total of 2634 Proof of Claim Forms which were filed with the Special Master on or before December 20, 1993, *including* those Proof of Claim Forms referenced in my original affidavit. As of January 7, 1994, Liberty National understood that the Special Master had not completed copying and transmitting all Proof of Claim Forms filed on or before December 20, 1993, though the vast majority had been copied and transmitted.

3. The chart attached hereto as Exhibit T is a revised and updated version of the chart attached to my original affidavit as Exhibit T. As shown by Exhibit T, as of January 10, 1994 Liberty National had received a total of 1689 Proof of Claim Forms submitted by claimants who answered "no" to any one of the first four questions of the Proof of Claim Form. Persons who answer "no" to one of the first four questions of the Proof of Claim Form are not eligible for restitution, nor are they eligible to share in either of the two monetary settlement pools under the terms of the Stipulation.

4. The chart attached hereto as Exhibit U is a revised and updated version of the chart attached as Exhibit U to my original affidavit. As shown by the revised Exhibit U attached hereto, as of January 10, 1994 Liberty National had received a total of 945 Proof of Claim Forms which contained "yes" answers to each of the first four questions on the Proof of Claim Forms. To

be eligible to share in the \$1,000,000.00 settlement pool, a claimant must, among other things, qualify as a class member; must accurately answer "yes" to the first four questions of the Proof of Claim Form; must submit the required supporting documentation with the Proof of Claim Form; must have replaced an "old policy" (as defined in the Stipulation) with a "new policy" (as defined in the Stipulation) within 30 days of lapsing the "old policy"; must have submitted claims for cancer benefits while the "new policy" was in force; must have incurred expenses for radiation, chemotherapy, prescription chemotherapy, or out-of-hospital prescription drugs which were not fully paid by Liberty National; and must submit a timely and proper Proof of Claim Form. To be eligible for the \$3,000,000.00 settlement pool, the claimant must meet all of the foregoing criteria *and* must have received fewer total benefit dollars under the "new policy" than would have been received under the pertinent "old policy" for the same overall cancer treatment. Complete eligibility requirements are set forth in the Stipulation and the Proof of Claim Form.

5. The chart attached hereto as Exhibit V is a revised and updated version of the chart attached as Exhibit V to my original affidavit. The chart attached hereto as revised Exhibit V lists all of those class members who filed Proof of Claim Forms which were received by Liberty National on or before January 10, 1994 and which could *potentially* meet the eligibility requirements to share in the \$1,000,000.00 pool, based upon Liberty National's review to date. The persons listed on Exhibit V are persons who submitted Proof of Claim Forms received by Liberty National on or before January 10,

1994, answered "yes" to the first four questions on the Proof of Claim Form, had an "old policy" in force or in the grace period on or after August 29, 1986, and later switched to the new policy and had claims under the new policy. Some, but not all, of the persons listed on Exhibit V will also share in the \$3,000,000.00 pool. Persons listed on Exhibit V will share in the \$3,000,000.00 pool only if they are determined to have received fewer total dollars under their "new policies" than would have been received under their "old policies" for the same overall cancer treatment, and only if they meet all other eligibility requirements as well. With respect to Proof of Claim Forms received by Liberty National on or before January 10, 1994, (revised Exhibits T and U attached hereto), claimants who are *not* listed on Exhibit V have been determined *not* to be eligible for either of the two monetary settlement pools, based upon the information reviewed by Liberty National.

6. Of the 664 class members listed on revised Exhibit V, 542 had radiation and chemotherapy claims under a new policy, according to the information tabulated to date.

7. A total of 139 of the 664 potentially eligible Proof of Claim Forms listed in the revised Exhibit V attached hereto have been analyzed thus far. Corrected, revised, and updated versions of the original 107 comparisons attached as Collective Exhibit W to my original affidavit plus the additional comparisons performed by Liberty National with respect to potentially eligible Proof of Claim Forms between the date of my original affidavit and the date of this affidavit are attached hereto as revised Collective Exhibit W.

8. The revised Collective Exhibit W to this affidavit shows that of the 139 claimants for whom analyses or comparisons have [sic] completed thus far, 94 received *more* total dollars under their new policy than would have been received under the previous old policy for the same overall cancer treatment, and only 35 received *fewer* total dollars under their new policy, according to the information submitted with the Proof of Claim Form and with the original claims of each claimant. An additional 10 of the 139 claimants shown in Collective Exhibit W to this affidavit did not require a comparison, because they received no radiation, chemotherapy, prescription chemotherapy or out of hospital prescription drugs for their cancer treatment. Under the terms of the Settlement, persons who did not have any radiation, chemotherapy, prescription chemotherapy, or out-of-hospital prescription drugs as part of their cancer treatment are not eligible for restitution, nor are they eligible to share in either of the two settlement pools.

9. Revised Collective Exhibit W to this affidavit also shows (for each claimant) the number of days of radiation/chemotherapy treatment exceeding \$500.00 per day and the number of days of radiation/chemotherapy treatment which did not exceed \$500.00 per day. Revised Collective Exhibit W to this affidavit shows that for the entire group of 139 claimants reflected in that Collective exhibit, there were only 826 days of radiation and chemotherapy for which the actual charge *exceeded* the applicable \$500.00 daily limit of the new policy, and 5288 days of radiation and chemotherapy treatment for which the actual charge was less than \$500.00 per day. (In addition, for the entire group of 139 claimants reflected in revised



Collective Exhibit W to this affidavit, there were only 20 days of radiation and chemotherapy treatment which exceeded the applicable \$250.00 daily limits of a claimant's Senior Cancer Care policy, compared to 49 days under that applicable \$250.00 limit).

10. As shown by revised Exhibit V attached hereto, 664 claimants have submitted Proof of Claim Forms received by Liberty National on or before January 10, 1994 which are *potentially* eligible for one or both of the monetary settlement pools. Thus far, 139 of those 664 Proof of Claim Forms have been analyzed or processed, and only 35 of those 139 (or approximately 25.18%) represent class members who had claims for radiation, chemotherapy, prescription chemotherapy, or out-of-hospital prescription drugs, but received fewer total dollars under their "new policies" than would have been received under their "old policies" for the same overall cancer treatment. Thus, to date, only 35 claimants are known to be eligible for *both* the \$3,000,000.00 and \$1,000,000.00 monetary pools under the settlement, with 139 of 664 *potentially* eligible Proof of Claim Forms having been processed. Assuming this percentage remains consistent as the remaining *potentially* eligible Proof of Claim Forms are analyzed and processed, it may be expected that no more than 167 (25.18% of 664) of the class members listed on revised Exhibit V will be eligible to share in the \$3,000,000.00 settlement pool (and probably less than that number for the reasons set forth in paragraph 29 of my original affidavit). If the Settlement is approved and affirmed, all who qualify for the \$3,000,000.00 settlement pool will also share in the \$1,000,000.00 settlement pool,

and will also receive 100% restitution of the actual difference in total benefits under their old and new policies.

11. Any persons listed on the revised Exhibit V attached hereto who received *more* total dollars under their new policy – but nevertheless exceeded a daily limit under their new policy for radiation or chemotherapy, exceeded an annual limit on prescription chemotherapy under the new policy, or incurred expenses for non-cancer-fighting out-of-hospital prescription drugs in connection with their cancer treatment – are still *potentially* eligible to share in the \$1,000,000.00 settlement pool, but *not* the \$3,000,000.00 settlement pool. For the reasons stated in paragraph 32 of my original affidavit, not all of the persons listed on Exhibit V will in fact prove eligible for either of the monetary settlement pools. Nevertheless, of the class members who filed timely and proper Proof of Claim Forms (revised Exhibits T and U attached hereto), no more than the 664 claimants listed on the revised Exhibit V attached hereto are even *potentially* eligible for the \$1,000,000.00 pool.

12. It is, and to my knowledge always has been Liberty National's policy and practice to deliver each of its customers the policy purchased from Liberty National following the issue of such policy. These policies are either delivered by mail or hand delivered by the agent in charge of the debit route applicable to the customer. In addition, duplicate policies are provided in the ordinary course of business upon request.

13. Attached hereto as Exhibit X is a list of Proof of Claim Forms apparently submitted on or before the December 20, 1993 deadline for filing Proof of Claim



Forms, but which were not received by Liberty National until after January 10, 1994. No determination has been made at this time as to whether any of these claimants are potentially eligible for either of the two monetary settlement pools. When these additional Proof of Claim Forms are analyzed, the estimates contained in this affidavit may increase by a very small percentage.

14. I have personal knowledge of (and access to business records of Liberty National concerning) the matters set forth in this affidavit, and, subject to any inadvertent, undiscovered or typographical errors or omissions, the documents attached hereto accurately summarize the matters they purport to show based upon information obtained from the Proof of Claim Forms and business records of Liberty National, to the best of my knowledge, information and belief. Except as expressly updated or modified herein, the testimony set forth in my original affidavit remains my testimony, and that testimony is accurate to the best of my knowledge, information and belief. There will be further review and verification by Liberty National of the charts attached hereto between now and the date of final submission of these comparisons to the Special Master.

/s/ Thomas E. Hamby  
Affiant

Sworn to and subscribed before  
me this 16th day of January, 1994.

/s/ Betsy P. Collins  
Notary Public

My commission expires: 7/26/94  
[SEAL]

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EXHIBIT: 2, 3, 4, 5, 6 &amp; 7

VOLUME: 4

IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of a	)	
class,	)	CIVIL ACTION
	)	NO. CV92-021
Plaintiffs,	)	
	)	
v.	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant	)	

EXHIBITS TO  
LIBERTY NATIONAL'S STATEMENT OF FACTS,  
EVIDENCE AND AUTHORITIES IN SUPPORT  
OF PROPOSED CLASS ACTION SETTLEMENT

James W. Gewin  
Michael R. Pennington  
Horace G. Williams  
Attorneys for Liberty  
National Life Insurance  
Company

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ROBERTSON V. LIBERTY NATIONAL  
BARBOUR COUNTY CV92-021

Index of Objectors

INDIVIDUAL OBJECTORS FILING ON THEIR  
OWN BEHALF

Norma S. Gordon/Kelly G. Hooper  
Jackie C. Robertson  
Robert J. Gross, Jr.  
Geraldine Pinkston  
Mamie Harvey  
Guy Robert Jackson, Jr.  
Thelma S. Jackson  
Arlie R. Woodard

ADAMS/REESE

Willie Reese  
Mattie Reese  
Bobbie D. Lee

ARMBRECHT/JACKSON

Guy Adams  
Alice Adams  
Retha B. Attaway  
Beatrice Bateman  
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Dr. Neil Capper  
Anna Clausen  
Billy Clausen  
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 Arnold Pitt  
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 Mr. John Atchison  
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 Mrs. Thomas M. Barnhill  
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 Mrs. Thomas H. Benton  
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 Mary N. Carlisle  
 Nila M. Carlisle  
 William M. Carlisle  
 (deceased)



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	Lisa Hannah

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 Harry M. May, Jr.  
 Lucille H. Kelleher  
 William A. Kelley  
 Tina Kilborn  
 Jack Kinsey  
 Jason Kinsey  
 Shannon Kinsey  
 George Lee  
 Nell Lee  
 Richard Lee  
 Dwight Marrow  
 Mary Dayton Marrow  
 Barbara Martin  
 Jimmie Dee Martin  
 Marta L. Mathaney  
 Robert Mathaney  
 Harry V. May  
 Rhonda R. May  
 Shirley May  
 Hazel Mayo  
 James Mayo  
 Glenda Mills

Howard Mills  
 Jonathan Mills  
 Valenda Mills  
 Willie Moyde  
 Cynthia Owens  
 Andrea L. Parker  
 Catherine Parker  
 Crystal D. Parker  
 Gordon F. Parker  
 Martha L. Parker  
 Stacey A. Parker  
 Howard Parmer  
 Mamie Parmer  
 Chester Patrick  
 Geneva Patrick  
 Barbara C. Raines  
 Eddie D. Raines  
 Leon E. Raines  
 Teresa D. Raines  
 Billy Don Ryan  
 David L. Ryan  
 Kelley L. Ryan  
 Partick [sic] Ryan  
 Sarah L. Ryan  
 Gary Saxon  
 Paula Saxon  
 Jason Smith  
 Rodney Smith  
 Sheila Smith  
 Tiffany Smith  
 William D. Bailey, Sr.  
 Annie Tillman  
 Ashleigh Tindal  
 Cherylann Tindal  
 Meagan Tindal  
 Michael Tindal  
 Diane Weeks

Jennifer Weeks  
Jonathan Weeks  
Lalonie Weeks  
Thomas Weeks  
Betty Williams

#### GLIDEWELL

Billy Wayne Robertson  
Billy Weston Robertson  
Nancy Eagan Robertson  
Melinda Lee Robertson

#### GUDAC

Larry L. Andrews  
Jane E. Ankerson  
Rosalie B. Ankerson  
Edward J. Arata  
Margery J. Baxer  
August T. Bozant  
Teresa R. Bozant  
Lois Brettel  
Thomas Brettel  
Joseph E. Broughton  
Susan L. Brown  
Barbara Burgess  
Michael Burgess  
Linda Butts  
Richard Butts  
Robert H. Butts  
William H. Butts  
Jesse L. Carlise  
James P. Cofield  
Barbara Cooper  
Lillie J. Cooper  
Thomas Cooper  
Robert & Mellissa Cox  
Patricia R. Estes

Randolph Williams  
Rex Witt  
Ruby Nell Witt  
Mirian Wooten

Wylie L. Estes  
John C. Goodwin  
Ruth F. Granade  
Larry Hester  
Doris Hewett  
Pamela S. Hewett  
Scott Hewett  
Robert Holifield  
John A. McRae, Jr.  
Madeline K. Burnes  
Daphne P. Kelley  
Douglas E. Kelly  
Barry L. Kitchens  
Gladis B. Kitchens  
George W. Lewis  
Shawn M. Lewis  
Byron Lundy  
Kevin M. McPherson  
Lucille McPherson  
Catherine A. McRae  
Lucille L. McRae  
Monica G. Merifield  
Jerry Money  
Maynard K. Peckham  
Jewell B. Pierce

David Pitt  
Melvin J. Pitt  
Diane Presley  
Michael Presley  
Jerry L. Pulliam  
Rhonda L. Pulliam  
D.E. Revere  
Jean Revere (deceased)

#### HAND/ARENDALL

Mr. Vernon Adamson, Sr.  
Mrs. Vernon Adamson, Sr.  
Sybil R. Blackwell  
Marsha N. Britton  
Vera K. Bynum  
Charles D. Byrd Mrs.  
Charles D. Byrd  
James L. Calcote  
Mrs. James L. Calcote  
William W. Chunn  
Mrs. William W. Chunn  
Edwina C. Clearman  
SaMartha B. Colvin  
Janet Cook  
Kenneth H. Cook  
Helen H. Day  
Ronald V. Dixon  
Louise N. Dunaway  
Carol B. Golden  
Joseph R. Havard  
Brenda Havard  
Myrtle O. Hawman  
Mark L. Howell  
Mrs. Mark L. Howell  
Foster L. Jones, Jr.  
Mrs. Foster L. Jones  
Jewel N. Jones

Richard L. Russell  
Curtis L. Shewmake  
Nelma G. Shewmaker  
Cleveland Smith  
Gary O. Smith  
Cecilia R. Street  
John D. Turner

Ellen R. Lesley  
Eunice W. Long  
Myrna B. Matthew  
Allen K. Middleton  
Mrs. Allen K. Middleton  
Alberta D. Overstreet  
Vivian C. Overstreet  
Marice E. Perkins, Jr.  
Betty T. Phillips  
George Reeves, Sr.  
Mrs. George Reeves, Sr.  
James R. Reeves, Sr.  
Mrs. James R. Reeves, Sr.  
Helen R. Rhodes  
Carlton D. Robertson  
Mrs. Carlton Robertson  
Allen H. Ryals  
Mrs. Allen H. Ryals  
Dorothy H. Scoggins  
Thomas G. Scoggins, Jr.  
Mildred L. Smith  
Ruth M. Walton  
Daniel A. Warren  
Dorothy A. Warren  
Randal S. Warren  
Timothy J. Warren  
Max L. Yates  
Mrs. Max L. Yates



**HANNAH/MARSEE**

Little George Gilbert  
 Richard L. Hartman  
 Ralph Howell  
 Winnie Howell  
 Gloria J. McQuien  
 Edith Oliver  
 Patti Scott (admstrtr/N. Perkins)  
 Patti Scott (repersnt [sic]/B. Perkins)  
 Vicki Reynolds  
 Roberta M. Shaffer  
 Dorothy M. Shuler  
 Inez Walker

**HESS/ATCHISON**

Douglas C. Hammac, Sr.  
 Virginia E. Hammac  
 Victor C. Lazzari, Jr.  
 Paula C. Lazzari  
 Terry W. Knight  
 Pamela C. Knight

**MCFADDEN/LYON**

Samuel R. Anderson  
 Beverly Crenshaw  
 Larry K. Crenshaw  
 Jewel I. Crenshaw (L.K. Crenshas [sic] executor)  
 Wanda Waters Doole  
 Chester C. Harden  
 James D. Harrington  
 Lynn H. Harrington  
 Theresa D. McGehee  
 Helen P. Megginson  
 Ronald A. Megginson  
 Lynn C. Miller  
 Ronald W. Montgomery  
 Bruce W. Seaman

Estel J. Waller  
 Wayne E. Waller

**MANTIPLY & ASSOCIATES**

Lynn C. Miller

**MAPLES/LOMAX**

Guy Aubrey Bell  
 Mrs. Guy Aubrey Bell  
 Jo Minter  
 Bradis M. Crocker  
 Artis Crocker  
 Joe Nance  
 Mrs. Joe Nance  
 James W. Scott  
 Jaems H. Bonniwell  
 John Doe (other unnamed objectors)

**OLEN/MCGLOTHREN**

John W. Curtis  
 Susan W. Curtis

**POSEY**

Winona H. Turk

**PERLOFF**

Robert L. Alday  
 Terry L. Alday  
 Edith F. Boudan  
 Edith M. Boudan  
 Gary A. Brunson  
 Billy H. Cooner  
 Steven D. Cooner  
 Brenda York Cooper  
 Clarence Davis  
 Tony R. Davis  
 Helen B. Eslava  
 Sylvia L. Glisson  
 Marie K. Peevy

William J. Pierce  
Betty Napier Stacey

### **RAGSDALE**

Darlene Skinner  
Walton K. Shinner  
Judy K. Gann  
Jodie E. Gann  
Teresa Mize  
Carol Thompson (T. Mize Executor)  
Jean S. Stoltz  
Lena Latham  
Howard F. Smith

### **RICHARDSON/DANIELL**

Telecia Paulk (f/n/a)  
Donald L. Allen  
Mary J. Allen  
Bennie F. Baker  
Gladys R. Baker  
Alma G. Barnes  
William A. Barnes  
William T. Beasley  
Margaret Beech  
Grace Biondolillo  
Hiram R. Burge  
Carel D. Bush  
Ashton B. Cannon  
Carolyn Cannon  
Brenda S. Cazalas  
Edna W. Collings  
Leslie C. Collings  
Sallie M. Conway  
Deborah M. Cox  
Tommy R. Cox  
Leo C. Crain  
Sandra E. Crain

Angela DeSantis  
Pat DeSantis  
Penelope A. DeSantis  
Della M. Finlay  
Lore M. Franklin  
Delecia Gibbs  
Charles R. Gilbert  
Deborah Guy  
Raymond Guy  
Wyone Guy  
Judith C. Hinton  
Linda H. Hoss  
Richard J. Hoss  
Daisy D. Howell  
Douglas W. Howell  
Lucille J. Jackson  
Francis L. Jockisch  
Theodore W. Jockisch  
Bryon D. Ray, Jr.  
Rayford Hinton, Jr.  
Warren G. Stanley, Jr.  
Lois N. Klaas  
Ruby Knapp

William D. Knapp  
Gloria W. Lumpkin  
Phillip Bruce Lumpkin  
David L. Lynd  
Elizabeth S. Lynd  
Delores M. Gilbert  
Hugh F. McCoy  
Annie G. Miller  
Floyd J. Miller  
James J. Mitchener  
Sally F. Mitchener  
Catherine J. Odom  
Hubert R. Odom  
Jamie Phillips  
Susan T. Price  
Gail Pruitt  
Albert E. Ray  
Cora Q. Ray  
Lynn M. Ray  
Mickey E. Ray  
Patrick Ray  
Willie J. Ray  
Kay I. Rose  
Augustus L. Smith  
Donald E. Smith  
Jean M. Smith  
Karen K. Smith  
Patricia L. Smith  
Sue Ann Smith  
Thomas Wayne Smith  
William C. Smith  
David A. Rose, Sr.  
James P. Cazalas, Sr.  
Wesley R. Beech, Sr.  
Joye Spear  
Louie B. Spear

Vicki H. Stanley  
Joseph H. Lofton Stephen  
James V. Stowe  
Juanita R. Stowe  
Wilanne S. Stowe  
Essie Lee Taylor  
Ruby M. Taylor  
Betty B. Tedder  
Julian Tedder  
Barry Thompson  
Jimmy A. Thornton  
Carol Townsend  
Mike Townsend  
Lottie Trest  
William C. Trest  
Jesse M. Turner  
Robert A. Vanek  
Maurice Vautier  
Joanne B. Voividich  
Ruby Walker  
Edna Watford  
James F. Watford  
Lois Watford  
Roy A. Watford  
Clyde Watson  
Rosemarie P. Watson  
Rubbie Wheeler  
Gloria Whigham  
Henry D. Whigham  
Beatrice White  
James B. White  
Donald R. Willaims  
Olga N. Williams  
James F. Willis, Sr.  
Anita D. Willis  
Juanita Wilson  
Norris F. Woodard

Lois M. Woodard  
James E. Wooley  
Linda C. Wooley

# **R. RICHARDSON**

Rubey S. Posey  
& Alfred Posey

# **SIMS**

Margaret (Peggy) Adair  
Albert H. Adams, Jr.  
Elisse T. Adams  
Audrey Addicks  
David Addicks  
Eugene Addicks  
Mark Addicks  
Monica Addicks  
Ramona Addicks  
Jeffrey S. Albritton  
Anthony E. Allen  
Carol Allen  
Michael Allen  
Nancy Allen  
Cecil Anthony  
Marjorie Anthony  
David Arbo  
Joann Arbo  
William Arbo  
Rhonda Arnold  
Richard Arnold  
Jean Baerlin  
Jane Baggett  
Helen Baker  
Kathleen Baker  
Ralph Baker  
Stephen Baker  
Lisa Ballard

Robbie Ballard  
Raymond D. Barbour  
Ruby Barrett  
Mary Bass  
Rita Bates  
Robert A. Bates  
Donna Beasley  
Doris Beasley  
Horace E. Beasley  
Terry W. Beasley  
Paul E. Beeson  
Ina H. Bekcer  
Jerry Bell  
Sharon Bell  
Annie Bennett  
James Bennett  
Robbie Bethea  
Marvin Bodiford  
Nancy Bodiford  
Ruby Bodiford  
Elzy Booker  
Helen Booker  
James Bosarge  
Mary Bosarge  
Sybil Bosarge  
Dorothy Boutwell  
Kenneth Boutwell  
George B. Bradford  
Donna Bradley

Glen Bradley  
Murray Brigham  
John Bright  
Christine Britt  
Francis Broadus  
Joseph Broadus  
Carolyn Brooks  
Paul Brooks  
Byron Brown  
Margaret Brown  
Ronald Brown  
Virginia Brown  
Walter Ray Brown  
Peggy Bryant  
Gladys Burgdorf  
Richard Burgdorf  
Tommy A. Burke  
Delana Bush  
James Bush  
Christine Butler  
Audrey G. Byrd  
Gregory Byrd  
Lula M. Byrd  
Mildred Byrd  
Warren Byrd  
Willoughby Byrd  
Joseph Carlisle  
Patsy Chapman  
Tommy Chapman  
Clarence Chatom  
Gloria Chatom  
Sue Chism  
William R. Chism  
Rhonda Clark-Hall  
Sue Coley  
Leila S. Collier

Leon W. Collier  
Joyce D. Collins  
Betty P. Connell  
Alice J. Cooley  
Leon N. Cooley  
Mary Cox  
Wilton Cox  
Harold Crowder  
Monette Crowder  
F.A. Davis  
Mary Davis  
Pamela Davis  
Patricia Davis  
Ronald Davis  
Scott Davis  
Charles Day  
Kay Day  
Lillian G. Day  
Linda Morris Dennis  
B.F. Dismukes  
Grace A. Dixon  
Dorothy Dobbins  
Helen Donald  
Herbert Donald  
Michael Donald  
Carolyn Driskell  
Nathan Driskell  
Albert Drummond  
Dorothy Dunagan  
Charles Dunklin  
June Dunklin  
Don Dunn  
Lenora Dunn  
Hazel Dysart  
Jacob Elmore  
Matha Elmore  
Theda S. Enfinger



Donna England  
 Melvin England  
 Dorothy Eslava  
 Ada Evans  
 Darrell Evans  
 Doris Evans  
 David Faggard  
 Nathalee Faggard  
 Gerald C. Foster  
 Gladys M. Foster  
 Kay F. Freel  
 Robert Fryer  
 Kathleen Garner  
 Beatrice Garrison  
 Mazie Gartman  
 Betty Gates  
 William Gates  
 Helen Gazzier  
 Johnny Gazzier  
 Edgar Gettz  
 Roberta Gettz  
 Brenda H. Godfrey  
 Lawrence Green  
 Betty Griffin  
 George T. Griffin  
 Annette Grissett  
 Lary Grissett  
 Joe Gurganus  
 Sheila Gurganus  
 Waylond Halcomb  
 Willie Halcomb  
 Catherine Hall  
 Darryl Hall  
 Gladys Hannah  
 William Hannah  
 Marilyn Harbison

Winston Harbison  
 Mark Harding  
 Bonnie Harris  
 Carey Harris  
 William M. Harris  
 Mike Harrison  
 Karen Hassell  
 William Hassell  
 John Hawseu [sic]  
 Katherine Hawsey  
 Inez Headrick  
 Leo Headrick  
 Lois Hebert  
 Francise Hervert  
 Christine L. Hicks  
 William Howell  
 Clark Hobson  
 Alvin Hoffman  
 Glenda Hoffman  
 Fred Holley  
 Kathleen Holloway  
 Claudia Holmes  
 Levi Hopkins  
 Randall S. Hopkins  
 Cindy House  
 Emma House  
 Preston House  
 Tommy House  
 Faye Howell  
 David Howton  
 Doris Howton  
 Anna Huber  
 Hubert Huber  
 Grady Nichols, III  
 Jean Nichols, III  
 Charles Ingram  
 John Irving

James (Keith) Jackson  
 Mary Jackson  
 James Jeffcoat  
 Martha Jeffcoat  
 Annie L. Jennings  
 Jimmie Johnson  
 Luther Johnson  
 Inez Jones  
 Jimmy Jones  
 Albert McFadden, Jr.  
 Frederick Moore, Jr.  
 Garland Pressley, Jr.  
 James H. Britt, Jr.  
 Gary M. Kelley  
 H.E. Kelley  
 Marcelle Kelley  
 James Kendrick  
 Charles D. Kittrell  
 Elwood Kittrell  
 Wynnonia Kittrell  
 Gail LaForce  
 Steven LaForce  
 Hilda A. Lambeth  
 Paul C. Lambeth  
 Beatrice W. Lamey  
 Carla Lamey  
 John Tom Lamey  
 John H. Lamey  
 Madelaide Lamey  
 Robert Lamey  
 Nita Lancaster  
 Janice Lane  
 Anna Laura  
 Clement Laura  
 Betty Lester  
 George Lester

Floyd Lewis  
 R.V. Lofton  
 Angie Logan  
 Blaine Logan  
 Jerry Loper  
 Virginia Loper  
 Florence Lumpkin  
 Curtis James Mallon  
 Pearl Mallon  
 Edna Malone  
 Jamice Mareno  
 Mary Martin  
 Melton Martin  
 Alan Mashburn  
 Davis Mashburn  
 Patricia Mashburn  
 Robert Mashburn  
 Henry McCauley  
 Martha McCauley  
 Francis McDonald  
 Joe McEarchern  
 Melissa Mcfadden [sic]  
 Albert McFadden  
 Dawn McLean  
 Deborah Meadows  
 Mark Meadows  
 Margaret Melech  
 Joyce Middleton  
 Terrell Middleton  
 John Miller  
 Nancy Miller  
 Ola V. Miller  
 Velma Miller  
 Timothy H. Mills  
 Mary C. Mixon  
 Sharon Moffat  
 Ted W. Moffat

Lola Moiren  
 Curtis Moon  
 Derwood Morgan  
 Janet Mosley  
 George Muscat  
 Susan Muscat  
 Melissa Nall  
 Caleb Necaise  
 Judy Necaise  
 Essie Neilson  
 Charles Nunnery  
 Melissa Overstreet  
 Mitchell Overstreet  
 Mike A. Pace  
 Ann Parden  
 Lonnie Parden  
 William Patronas  
 Dorothy Perry  
 Georgia Louise Pierce  
 Marian Pierce  
 Bama Pitt  
 William Pitt  
 J.M. Pitts  
 Mary Pitts  
 Maylean Powell  
 Garland Pressley  
 Janice Pressley  
 Douglas Previto  
 Edith Previto  
 Mary Price  
 Roy Price  
 Willard P. Price  
 Voncile L. Pritchett  
 Gloria Pruett  
 John Pruett  
 Nancy Raines

Catherine Raymond  
 James Raymond  
 Carol Reeves  
 John Reeves  
 Carolyn Roberts  
 Sharon Robertson  
 Tianna L. Robertson  
 Yvonne Ross  
 Ethel Sansom  
 Barbara Schottgen  
 Seelhorst  
 Jim Sheffield  
 Thomas Shoemaker  
 Anita Sisson  
 D.W. Sisson  
 Mavis Smith  
 Judy Spears  
 Frank Kruse, Sr.  
 Gwilyn Johnson, Sr.  
 Jean P. Stephen  
 Elmer Steward  
 Mary Ann Steward  
 T. Weston Stewart  
 Janis Story  
 Grace J. Taylor  
 Mary F. Thompson  
 William Thrower  
 Sylvia Walton  
 Eastman Weaver  
 Marilyn Weaver  
 Edith White  
 James White  
 Stephanie Williams

**SIROTE**

Jeffrey S. Albritton  
 Anthony E. Allen  
 Carol Allen  
 Jean Baerlin  
 Roberta Bates  
 Rita Bates  
 Horace E. Beasley  
 Doris Beasley  
 Terry W. Beasley  
 Donna Beasley  
 Ina H. Becker  
 Paul E. Beeson  
 James Bennett  
 Annei Bennett  
 Elzy Booker  
 Helen Booker  
 George B. Bradford  
 Glen Bradley  
 Donn Bradley  
 Christine Britt  
 James H. Britt, Jr.  
 Byron Brown  
 Walter Ray Brown  
 Margaret Brown  
 Tommy A. Burke  
 Willoughby Byrd  
 Lula M. Byrd  
 Mildred Byrd  
 Gregory Byrd  
 Tommy Chapman  
 Patsy Chapman  
 William R. Chism  
 Sue Chism  
 Leon W. Collier  
 Leila S. Collier

Leon N. Cooley  
 Alice J. Cooley  
 Wilton Cox  
 Mary Cox  
 Linda Morris Dennis  
 Dorothy Dunagan  
 Chrles [sic] Dunklin  
 June Kunklin [sic]  
 Dorothy Eslava  
 Gerald C. Foster  
 Gladys M. Foster  
 George T. Griffin  
 Betty Griffin  
 William M. Harris  
 Leo Headrick  
 Inez Headrick  
 Levi Hopkins  
 Bandall S. Hopkins  
 Emma House  
 Preston House  
 Tommy House  
 Cindy House  
 William Howell  
 Faye Howell  
 John Irving  
 Annie L. Jennings  
 Gary M. Kelley  
 H.E. Kelley  
 Marcelle Kelley  
 Steven LaForce  
 Gail LaForce  
 Paul C. Lambeth  
 Hilda A. Lambeth  
 John H. Lamey  
 Madelaide Lamey  
 Carla Lamey

Robert Lamey  
 John Tom Lamey  
 Beatrice W. Lamey  
 George Lester  
 Betty Lester  
 Florence Limpkin  
 Curtis James Mallon  
 Pearl Mallon  
 Terrell Middleton  
 Joyce Middleton  
 Ola V. Miller  
 Vema Miller  
 Ted W. Moffat  
 Sharon Moffat  
 Curtis Moon  
 George Muscat  
 Susan Muscat  
 Judy Necaise  
 Caleb Necaise  
 Essie Neilson  
 Lonnie Parden  
 Ann Parden  
 William Patronas

#### THIRY/CADDELL

Florence W. Clayton  
 Thurman F. Clayton  
 Wayne F. Clayton  
 Iveynelle Clayton  
 James F. Small  
 Karen H. Small  
 Woodrow Johnston  
 Gladys D. Johnston

Maylean Powell  
 Voncile L. Pritchett  
 Tianna L. Robertson  
 Jem Sheffield  
 Judy Spears  
 Jean P. Stephen  
 Joe N. Stephen  
 Barry Thompson  
 Jimmy A. Thornton  
 Mike Townsend  
 Carol Townsend  
 Maurice Vautier  
 James F. Watford  
 Lois Watford  
 Roy A. Watford  
 Edna Watford  
 Clyde Watson  
 Rosemarie P. Watson  
 Bubbie Wheeler  
 James B. White  
 Beatrice White  
 Juanita Wilson

#### WATSON

Harvey M. Young, Jr.

#### WILSON/KING

James E. Haynes  
 David R. Short

#### YEAROUT/MYERS

Alfred Hancock  
 Elvis D. Ray  
 Magoline Ray  
 Randall L. Gardner

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EXHIBIT: 19VOLUME: 21

IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of a class,	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	NO. CV92-021
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
Defendant	)	

EXHIBITS TO  
LIBERTY NATIONAL'S STATEMENT OF FACTS,  
EVIDENCE AND AUTHORITIES IN SUPPORT  
OF PROPOSED CLASS ACTION SETTLEMENT

James W. Gewin  
Michael R. Pennington  
Horace G. Williams  
Attorneys for Liberty National  
Life Insurance Company

OF COUNSEL:  
Bradley, Arant, Rose & White  
1400 Park Place Tower  
Birmingham, AL 35243  
(205) 521-8000

OF COUNSEL:  
Horace Williams, Esq.  
125 South Orange Ave.  
Post Office Box 896  
Eufala, AL 36072-0896

CHARLIE FRANK ROBERTSON V LIBERTY NATIONAL  
BARBOUR COUNTY/CV-92-021

Index of Objectors Filed After October 10, 1993

OBJECTORS APPEARING ON THEIR OWN BEHALF

Irene H. McCullough      11/01/93

ARMBRECHT/JACKSON

Hubert Bullington      Served 11/09/93

Ruth Bullington

Ellis Harwell

Joyce Harwell

Gussie Johnson

Willa Johnson

Fred Lewter

Linda Lewter

James R. McGahagin

David W. Mooney

David Nelson

Rebekah Oliver

Geneva Parden

Rosa Lee Prosser

Jean M. Sullivan

James R. Swilley

Linda S. Swilley

ALEXANDER/CORDER

Betty Ann Eckles      Served 12/7/93

BURR/FORMAN

Virginia H. Knight      Served 12/2/93

**GAISER/O'NEAL**  
**JOHNSON/CORY**

Lish U. Ellis Served 10/27/93  
 Malinda Ellis  
 Delores B. Forman  
 Robert L. Forman  
 Pamela Monroe  
 Ray Monroe  
 Joan Thrasher Served 11/18/93

**GARDNER/MIDDLEBROOKS**

Raymond Ellsworth Served 11/17/93  
 Vice Ellsworth  
 Charles Horton  
 Georgia Horton  
 Edgar Miller  
 Ellen Miller  
 Janet Richardson  
 Jennifer Smith  
 Steven Smith  
 Leslie Young  
 Lucille Young

**GILLION/BROOKS**

Betty Pratt Served 12/2/93  
 Wiley Pratt

**GLIDEWELL**

Herman Jackson Served 11/04/93  
 Minnie Lee Jackson

**HAND/ARENDALL**

Helen H. Day Served 11/8/93  
 (Executrix/R.H. Day, Deceased)  
 Mrs. Maurice E. Perkins, Jr.

**IRBY**

Merle L. Corcoran Served 11/05/93  
 Janie D. Devose  
 Ruby C. Ezell  
 Richard Kelly  
 Edward L. Lindsey  
 Cheryl G. Louder  
 John N. Matthews  
 Frankie G. McLain  
 Theresa C. Norton  
 Arnetta G. O'hara  
 Shirley A. Ragan  
 Mary L. Stimpson  
 James K. Williamson

Grace Williamson Served 11/12/93

**MCFADDEN/LYON**

Rosemary B. Latham Served 10/27/93  
 (Executrix of Estate):  
 James A. Latham, Jr.  
 Rosemary B. Latham,  
 Carl R. Latham  
 Mary K. Latham

Julian M. Brown Served 11/04/93  
 Augustus C. Schambeau Served 11/04/93

**MAPLES/LOMAX**

Clydia Alford Served 11/29/93  
 Betty Crawley  
 Vester Crawley  
 Oleta Davis  
 Prentiss Davis  
 Fern Garriga  
 Ray Robert Garriga  
 Luby Peterson  
 Others (Joe Doe)

OLEN/MCGLOTHREN

James Elmore Served 10/27/93

Ruth Elmore  
Ann Jacobson  
Malcolm Nicholas  
Vivian Nicholas  
Paulette Wilson  
Roger Wilson

Tony Hopper Served 11/02/93

Anita Hopper  
Ernest Rhone  
Arther Williams  
Lena Williams

Thomas Beck Served 11/04/93

Peggy Chappelle  
William Chappelle  
Esther Crabtree  
Debra Dickerson  
James Faircloth  
Nettie Helton -  
Dores E. James  
Jimmy G. James  
William H. Bostic, Jr.  
George Nicholas  
Hazel Nicholas  
Felix F. Reynolds  
Lori Reynolds

Jewel Hollingsworth Served 11/05/93

Pelham Hollingsworth  
Andrew Howle  
Dewanna Howle  
Martha Partidge

Charles B. Duckworth Served 11/08/93

Mary Duckworth  
Emanuel Gazzier

Gloria Gazzier  
Andrew J. Howle  
Betty P. Howle  
Darrell D. Ladnier  
Paula Michelle Ladnier  
A. C. Vickery

Mazel Cowart Served 11/12/93

Michael D. Evans  
Teresa Evans  
Elmore Harvison  
Jimmy Harvison  
W. Ruth Harvison  
Willie Dee Harvison

Opal Herm  
Billy C. Hoven  
Kathy Hoven  
Cathy Howard  
Clarence W. Coleman, Jr.  
Thomas W. Kelly  
Vicky Kelly  
Barbara Kohn  
Clyde Kohn  
Bessie Tipp

Ken Brown Served 11/19/93

Harriet Brown

Grover Bowdin Served 11/29/93

Mary C. Bowdin  
Cooper Cowart  
Mazel Cowart  
Franklin Wood, Jr.  
Cecil R. Trawick  
Peggy Trawick  
Franklin Wood  
Violet Wood

Norman Dicken Served 12/2/93  
Lynn Fillingim



Joseph G. Loftin  
Wanda R. Loftin  
Michelle Mayberry

Evelyn Harris  
John L. Harris, Jr.

Served 12/7/93

**SHERLING/BROWNING**

John M. Calogrides  
Mary L. Calogrides

Served 11/03/93

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**IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION**

CHARLIE FRANK ROBERTSON, )  
individually and on behalf of a )  
class, )

Plaintiffs, )

v. )

LIBERTY NATIONAL LIFE )  
INSURANCE COMPANY, )

Defendants. )

Civil Action No.  
92-021

STATE OF GEORGIA )  
FULTON COUNTY )

**AFFIDAVIT OF KRISTIE K. SAYRE**

Before me, the undersigned Notary Public in and for said county in said state, personally appeared Kristie K. Sayre, who being known to me and having been by me first duly sworn on oath, deposes and says as follows:

1. My name is Kristie K. Sayre. I have personal knowledge of the matters set forth in this affidavit based upon my education, my experience as an actuary, my experience in the insurance business, and based upon materials I have reviewed and the work I have performed over the last several months relating to cancer policies of Liberty National Life Insurance Company ("Liberty National"). My education, professional experience and qualifications as an actuary include the following:

a. I am employed at Tillinghast, a division of Towers Perrin as an actuarial consultant. Tillinghast is an actuarial consulting firm with offices in different cities in the United States and also in other countries. Tillinghast provides actuarial consulting services for a variety of different clients, private and governmental, related to the insurance industry. My business address is Tillinghast, One Atlanta Plaza, 950 East Paces Ferry Road, Atlanta, Georgia 30326-1119. I reside in Alpharetta, Georgia.

b. In 1973 I obtained a Bachelor of Science degree in mathematics from Furman University. From 1973-1975 I did additional academic work at the graduate level in the field of probability and statistics at Clemson University. From approximately 1975-1983, I was employed in the insurance industry and worked in various areas of the insurance business, including product development work relating to cancer insurance policies. My last position in the insurance industry was with Liberty Life Insurance Company of Greenville, South Carolina where I was serving as supervisor in charge of the Actuarial Services Division, where I supervised the personnel in that department in performing actuarial work. In approximately 1983 I left Liberty Life and joined the actuarial consulting firm of Sayre & Sayre, where we did consulting work primarily in the field of health insurance and life insurance. I worked as a consultant with Sayre & Sayre until 1992 when I joined Tillinghast as a consulting actuary. My work with Tillinghast includes consulting work for the health insurance and life insurance industry. My specialties include individual health insurance, product development and valuation.

c. I have been a Fellow of the Society of Actuaries since 1982 when I completed the nine examinations which were then required in order to become a Fellow. I currently serve on the exam committee of the Society of Actuaries which is responsible for the examination relating to individual health insurance. I am also the immediate past President of the Southeastern Actuaries Club, and I have served on its executive committee since 1987. I am also a member of the American Academy of Actuaries, which is the organization which governs the standards of actuarial practice in the United States.

d. I have been retained as an expert witness or consultant in connection with various litigation matters. I have been retained by the Internal Revenue Service and the Department of Justice on more than one occasion concerning taxation issues with respect to insurance companies. I have also testified as an expert in connection with private litigation involving actuarial issues related to insurance. Throughout most of my career as an actuary I have been involved in various aspects of health insurance, including cancer insurance, and I have performed consulting work for a variety of clients relating to cancer insurance and other types of health insurance.

2. I was retained on behalf of Liberty National to analyze certain cancer insurance policies and render an opinion on the relative value of the aggregate benefits of those Liberty National cancer policies. I was provided specimen copies of two Liberty National cancer policies issued prior to 1986 (the "old policies") and copies of two cancer policies issued by Liberty National in 1986 or thereafter (the "new policies"). Applying my education, training and experience in the actuarial field, particularly

including my experience with cancer policies, I evaluated the benefits under the different policies at different points in time and at different issue ages. I applied a method which I considered the most direct and best method for comparing the aggregate benefits of the different policies, and in my opinion the method I applied was a sound and accurate approach to this analysis. The basic source data for much of my work was the 1985 NAIC Cancer Claims Costs Tables, which are tables that are based on industry experience under cancer insurance plans. They were prepared by a committee working in conjunction with the National Association of Insurance Commissioners. The NAIC cancer tables are such that they can be changed for various benefit levels, assuming the benefit is one that is included in the tables, and they can be adjusted for different points in time after 1985. In addition, I relied in part upon reliable internal computer programs and other internal data of my firm, Tillinghast. Other Tillinghast employees assisted in this project, including one actuary who was involved in developing the tables which were the predecessor tables to the 1985 NAIC cancer tables. As is customary in actuarial work, I also applied my professional judgment where appropriate in developing the relative values.

3. Based on my training, education, experience and my work in connection with this analysis, it is my opinion that the old policies which I examined had fewer benefits in the aggregate than the new policies I examined. Stated otherwise, the value of the benefits in any of the old policies was less than the value of the benefits in any of the new policies I examined. The comparisons I made were to compare two old policies known as policy

form numbers 579 and 7023, which I compared to two new policy forms, policy form numbers 5GJ and 5GS. Attached hereto as Exhibit A is a summary we prepared showing the relative value of aggregate benefits between two of the policies at different points in time and at different ages. I compared form 579 and form 7023 to form 5GJ in both 1987 and 1992. I also compared form 579 and form 7023 to form 5GS in both 1987 and 1992. The figures shown on Exhibit A are the relative values of the aggregate benefits under each policy, but I arrived at these relative values by analyzing the individual benefits provided in each of the respective policies and then arrived at a total or aggregate value for each of the respective policies. As will be seen on Exhibit A, the benefits under the old policies (forms 579 and 7023) had a lesser aggregate value than the benefits under the new policies known as forms 5GJ and 5GS at each of the different ages in both 1987 and 1992. For example, as is shown on Exhibit A, in 1987 at issue age 55 the ratio of the net level cost for policy form 579 to the net level cost for policy form 5GJ was 45.4%. Copies of policy forms 579, 7023, 5GJ and 5GS are attached hereto as Exhibits B, C, D and E, respectively.

4. Based on my work in comparing relative aggregate benefits of these policies, it is my opinion that the population of persons (policyholders) purchasing either of these new policies (5GJ and 5GS) would be expected to receive significantly greater aggregate benefits under the new policies than under either of the old policies. Stated otherwise, any given policyholder who purchased one of



the new policies would be expected to receive significantly greater benefits under either of the new policies than under either of the old policies.

5. I am aware from my examination of these policies that neither of the old policy forms 579 or 7023 contained the limitations on radiation and chemotherapy which are found in the new policies and that the new policies do not have the coverage for non-cancer fighting prescription drugs. However, the additional benefits in the new policies which were not included at all in either of the old policies, as well as the increases in other benefits in the new policy, cause the new policies to have a significantly greater aggregate value of benefits than the old policies.

6. In my opinion at least 95% of insureds holding the new policies who would file claims would fare better under the new policies than under the old policies.

7. Further, deponent sayeth not.

/s/ Kristie K. Sayre  
Kristie K. Sayre

Sworn to and subscribed before me on this the 28 day of October, 1993.

/s/ Elizabeth W. Shutt  
Notary Public

Notary Public DeKalb County,  
Georgia My Commission Expires  
September 9, 1996

## LIBERTY NATIONAL LIFE INSURANCE COMPANY

## Cancer Net Level Cost Comparison\*

Issue Age	1987 Net Level Cost							1992 Net Level Cost						
	Form 579	Form 5GJ	Ratio Old/New	Form 7023	Form 5GJ	Ratio Old/New	Policy Count	Form 579	Form 5GJ	Ratio Old/New	Form 7023	Form 5GJ	Ratio Old/New	
15	\$5.40	\$11.37	47.5%	\$6.31	\$11.37	55.5%	308	\$8.14	\$13.37	60.8%	\$9.05	\$13.37	67.6%	
20	6.53	13.99	46.7%	7.66	13.99	54.8%	4,710	9.86	16.43	60.0%	10.99	16.43	66.9%	
25	8.83	19.10	46.2%	10.39	19.10	54.4%	7,495	13.33	22.41	59.5%	14.89	22.41	66.5%	
30	12.40	26.09	47.5%	14.53	26.09	55.7%	9,674	18.84	30.85	61.1%	20.98	30.85	68.0%	
35	17.83	37.08	48.1%	20.90	37.08	56.4%	8,799	27.15	43.95	61.8%	30.22	43.95	68.8%	
40	25.24	52.33	48.2%	29.63	52.33	56.6%	7,013	38.42	62.04	61.9%	42.81	62.04	69.0%	
45	34.46	72.37	47.6%	40.66	72.37	56.2%	7,701	52.19	85.42	61.1%	58.39	85.42	68.4%	
50	44.21	95.20	46.4%	52.61	95.20	55.3%	5,966	66.43	111.53	59.6%	74.83	111.53	67.1%	
55	54.73	120.65	45.4%	65.61	120.65	54.4%	4,595	81.60	140.35	58.1%	92.48	140.35	65.9%	
60	64.32	145.01	44.4%	77.60	145.01	53.5%	5,287	95.16	167.57	56.8%	108.44	167.57	64.7%	
65	71.30	164.97	43.2%	86.63	164.97	52.5%	4,410	104.58	189.25	55.3%	119.90	189.25	63.4%	
70	74.22	177.62	41.8%	91.02	177.62	51.2%	2,935	107.68	201.93	53.3%	124.46	201.93	61.6%	
75	73.47	184.30	39.9%	91.29	184.30	49.5%	1,505	104.93	207.02	50.7%	122.74	207.02	59.3%	
Weighted Average	32.90	72.88	45.1%	39.40	72.88	54.1%		49.02	84.70	57.9%	55.52	84.70	65.5%	

Issue Age	1987 Net Level Cost							1992 Net Level Cost						
	Form 579	Form 5GS	Ratio Old/New	Form 7023	Form 5GS	Ratio Old/New	Policy Count	Form 579	Form 5GS	Ratio Old/New	Form 7023	Form 5GS	Ratio Old/New	
15	\$5.40	\$13.90	38.9%	\$6.31	\$13.90	45.4%	308	\$8.14	\$16.01	50.8%	\$9.05	\$16.01	56.5%	
20	6.53	17.14	38.1%	7.66	17.14	44.7%	4,710	9.86	19.70	50.0%	10.99	19.70	55.8%	
25	8.83	23.46	37.6%	10.39	23.46	44.3%	7,495	13.33	26.93	49.5%	14.89	26.93	55.3%	
30	12.40	31.95	38.8%	14.53	31.95	45.5%	9,674	18.84	36.94	51.0%	20.98	36.94	56.8%	
35	17.83	45.27	39.4%	20.90	45.27	46.2%	8,799	27.15	52.49	51.7%	30.22	52.49	57.6%	
40	25.24	63.83	39.5%	29.63	63.83	46.4%	7,013	38.42	74.03	51.9%	42.81	74.03	57.8%	
45	34.46	88.36	39.0%	40.66	88.36	46.0%	7,701	52.19	102.07	51.1%	58.39	102.07	57.2%	
50	44.21	116.52	37.9%	52.61	116.52	45.2%	5,966	66.43	133.66	49.7%	74.83	133.66	56.0%	
55	54.73	148.07	37.0%	65.61	148.07	44.3%	4,595	81.60	168.76	48.4%	92.48	168.76	54.8%	
60	64.32	178.49	36.0%	77.60	178.49	43.5%	5,287	95.16	202.18	47.1%	108.44	202.18	53.6%	
65	71.30	203.70	35.0%	86.63	203.70	42.5%	4,410	104.58	229.20	45.6%	119.90	229.20	52.3%	
70	74.22	220.11	33.7%	91.02	220.11	41.4%	2,935	107.68	245.65	43.8%	124.46	245.65	50.7%	
75	73.47	229.37	32.0%	91.29	229.37	39.8%	1,505	104.93	253.24	41.4%	122.74	253.24	43.5%	
Weighted Average	32.90	89.56	36.7%	39.40	89.56	44.0%		49.02	101.97	48.1%	55.52	101.97	54.4%	

\* Represents the net level cost to the company of providing the benefits under the policy.

SAYRE  
Exhibit A

## LIBERTY NATIONAL LIFE INSURANCE COMPANY

## Cancer Claim Cost Comparison

Attn Age	1987 Annual Claims Costs					
	Form 579	Form 5GJ	Ratio Old/New	Form 7023	Form 5GJ	Ratio Old/New
15	\$4.34	\$8.86	49.0%	\$5.04	\$8.86	56.9%
20	4.24	8.74	48.5%	4.92	8.74	56.3%
25	4.76	10.84	43.9%	5.63	10.84	51.9%
30	6.41	14.24	45.0%	7.55	14.24	53.0%
35	9.32	19.68	47.4%	10.88	19.68	55.3%
40	14.54	29.55	49.2%	16.90	29.55	57.2%
45	23.03	46.02	50.0%	26.71	46.02	58.1%
50	32.56	66.92	48.7%	38.19	66.92	57.1%
55	44.11	93.94	47.0%	52.36	93.94	55.7%
60	56.95	124.23	45.8%	68.10	124.23	54.8%
65	68.60	153.42	44.7%	82.59	153.42	53.8%
70	75.83	174.52	43.5%	91.99	174.52	52.7%
75	77.05	185.65	41.5%	94.62	185.65	51.0%

1992 Annual Claims Costs					
Form 579	Form 5GJ	Ratio Old/New	Form 7023	Form 5GJ	Ratio Old/New
\$6.51	\$10.45	62.3%	\$7.21	\$10.45	68.9%
6.41	10.32	62.1%	7.09	10.32	68.6%
7.08	12.53	56.5%	7.96	12.53	63.5%
9.62	16.61	57.9%	10.75	16.61	64.7%
14.19	23.27	61.0%	15.75	23.27	67.7%
22.33	35.29	63.3%	24.69	35.29	69.9%
35.40	55.15	64.2%	39.08	55.15	70.9%
49.64	79.52	62.4%	55.26	79.52	69.5%
66.51	110.43	60.2%	74.77	110.43	67.7%
85.17	144.93	58.8%	96.32	144.93	66.5%
101.70	177.67	57.2%	115.69	177.67	65.1%
111.35	200.45	55.5%	127.50	200.45	63.6%
111.54	210.70	52.9%	129.11	210.70	61.3%

Attn Age	1987 Annual Claims Costs					
	Form 579	Form 5GS	Ratio Old/New	Form 7023	Form 5GS	Ratio Old/New
15	\$4.34	\$10.81	40.1%	\$5.04	\$10.81	46.6%
20	4.24	10.60	40.0%	4.92	10.60	46.4%
25	4.76	13.39	35.5%	5.63	13.39	42.0%
30	6.41	17.60	36.4%	7.55	17.60	42.9%
35	9.32	24.14	38.6%	10.88	24.14	45.1%
40	14.54	36.02	40.4%	16.90	36.02	46.9%
45	23.03	55.93	41.2%	26.71	55.93	47.8%
50	32.56	81.49	40.0%	38.19	81.49	46.9%
55	44.11	114.74	38.4%	52.36	114.74	45.6%
60	56.95	152.28	37.4%	68.10	152.28	44.7%
65	68.60	188.72	36.3%	82.59	188.72	43.8%
70	75.83	215.45	35.2%	91.99	215.45	42.7%
75	77.05	230.27	33.5%	94.62	230.27	41.1%

1992 Annual Claims Costs					
Form 579	Form 5GS	Ratio Old/New	Form 7023	Form 5GS	Ratio Old/New
\$6.51	\$12.49	52.1%	\$7.21	\$12.49	57.7%
6.41	12.26	52.3%	7.09	12.26	57.8%
7.08	15.17	46.7%	7.96	15.17	52.4%
9.62	20.09	47.9%	10.75	20.09	51.5%
14.19	27.91	50.8%	15.75	27.91	54.4%
22.33	42.05	53.1%	24.69	42.05	56.7%
35.40	65.52	54.0%	39.08	65.52	59.7%
49.64	94.72	52.4%	55.26	94.72	58.3%
66.51	132.07	50.4%	74.77	132.07	56.6%
85.17	174.01	48.9%	96.32	174.01	55.4%
101.70	214.19	47.5%	115.69	214.19	54.0%
111.35	242.68	45.9%	127.50	242.68	52.5%
111.54	256.57	43.5%	129.11	256.57	50.3%



IN THE CIRCUIT COURT FOR  
BARBOUR COUNTY, ALABAMA  
Clayton Division

CHARLIE FRANK ROBERTSON, )

Plaintiff, )

v. )

LIBERTY NATIONAL LIFE )  
INSURANCE COMPANY )

Defendant. )

CIVIL ACTION  
NO.  
CV-92-021

STATE OF NORTH CAROLINA  
COUNTY OF FORSYTH

AFFIDAVIT OF W. H. ODELL

Before me, the undersigned Notary public in and for the State of North Carolina, personally appeared before me W. H. Odell who is known to me and who being by me first duly sworn on oath, deposes and says as follows:

1. My name is W. H. Odell, and I reside in Yadkin County, North Carolina. I am an adult, and I am competent to give this affidavit.

2. I am employed as a consulting actuary with Odell & Associates, Inc., Winston-Salem, North Carolina. Our firm provides actuarial services for various private and governmental entities related to the insurance industry and other entities concerned with bearing risk. My education includes a B.S. degree in Economics which I obtained in 1954 from Wharton School of Finance and Commerce, University of Pennsylvania. I have been employed by

Prudential Insurance Company of America (1954-64), Life of Georgia (1964-68), Commonwealth Life Insurance Company (1968-70) and Capital Holding Corporation (1971-72) in various actuarial and management positions, all of which related in some way to actuarial science and insurance. From 1972 to 1982, I was Senior Vice President of Boone & Company, an actuarial consulting firm in Winston-Salem. I have been with my present firm, Odell & Associates, Inc. since 1982. I have therefore, been employed in the field of actuarial services for 39 years, including twenty years as a consultant, in addition to my earlier employment summarized above. Over the years, I have provided advice and consultation to many different insurance companies and insurance regulatory agencies. As a result of my education, training and experience, I am very familiar with different types of insurance policies, particularly including cancer insurance (specified disease), major medical insurance, accident insurance, health insurance, and life insurance. Indeed, not only do insurance companies employ and utilize actuaries to evaluate risks, project costs, and establish policy reserves, and liabilities, various state governments also utilize actuaries to review policy reserves and liabilities established by insurance companies as well as rate filings, and to assist in the reformation and liquidation of insurance companies. The federal government employs actuaries to prepare estimates of future costs and advise on such matters as health care legislation.

3. I have been and am a member of various professional organizations. I am a member of the American Academy of Actuaries, a Fellow of the Society of Actuaries, an Associate of the Casualty Actuarial Society and a

Fellow of the Conference of Consulting Actuaries. In 1980-82, I served as chairman of the Committee on Health Insurance of the Academy, and in 1980-83 I was on its Board of Directors. In 1982-88, I was on the Board of Directors of the Conference and have chaired its Committee on Health Insurance since 1988. In 1983-1993, I served as Chairman of the Health Subcommittee of the Standing Technical Advisory Committee to National Association of Insurance Commissioners (NAIC) Life, Health and Accident Standing Technical Actuarial Task Force. I chaired an NAIC Advisory Committee which developed the 1985 NAIC Cancer Claims Costs Tables. Attached as Exhibit A is a true copy of my curriculum vitae which includes a summary of my educational background, my professional position and activities, papers and other published materials.

4. Counsel for Liberty National Life Insurance Company ("Liberty National") provided me with copies of different cancer policy forms which include copies of policies issued to plaintiff Charlie Frank Robertson. These policies including certain "old" policies, which provided unlimited benefits for radiation and chemotherapy (Form nos. 579-11-75, and 7023) and also certain "new" policies which had limited benefits for radiation and chemotherapy (Form nos. 5GJ Ed. 8-86 and 5GS Ed. 9-89). I was asked by counsel for Liberty National to study these two groups of cancer policies and compare the benefits provided in each policy. We were asked to present a means by which we could rank the aggregate benefits of each plan in relation to the others. We did so by calculating index numbers (see below). In my opinion, these index numbers (point values or relativities) fairly represent a

measure by which the aggregate benefits of the four plans can be compared to one another.

5. In the process of examining and comparing the "old" policies and the "new" policies, I consulted data from and utilized extensively the National Association of Insurance Commissioners ("NAIC"), namely, the data commonly known as the 1985 NAIC Cancer Claim Cost Tables, which is an authoritative source of information pertaining to cancer policies, and this data is regularly relied upon by actuaries and other experts in the insurance industry, particularly regarding cancer insurance policies. A true and correct copy of the NAIC data is attached hereto as Exhibit B and was used to develop the relative aggregate benefits provided by the policies referenced above. In addition to the NAIC data which together with experience, judgment, and information available in the normal course of our business, were by far the primary source utilized for our examination, certain supplemental resources listed in Exhibit C were also utilized. The attached Exhibit D presents a table showing index numbers or relativities indicating the relative value of the aggregate benefits of each plan (set of policies). Form 579-11-75 is used as a standard and is assigned a value of 1.0000. The index number determined for each of the other plans indicates the relative value of the benefits for the specified plan to the aggregate benefits for Form 579-11-75. For example, for July, 1988, the index number of 2.289 for Plan 5GJ Ed. 8-89 indicates its values are 2.289 times those of Plan 579-11-75.

6. Based on my education, training and experience, and my examination of the "old" and the "new" policies, and having consulted the data from the 1985 NAIC

Claims Cost Tables, I have reached several opinions, including the following:

(a) The "new" policies cover more and different types of expenses than the "old" policies, and generally the benefits are greater under the "new" policies than the "old" policies. Exhibit D (referenced above) ranks the aggregate benefits of each plan in relation to the others (using Plan 579-11-75 as a standard). It clearly shows the "new" plans provide greater aggregate benefit values than the "old" plans.

(b) The "new" policies are more modern cancer insurance policies considering the developments and changes in medical care and treatment of cancer. Attached as Exhibit E is a chart which I prepared which reflects the relative benefits. For example the "first occurrence" benefit not available under the "old" policies is \$2,000 under the first of the "new" policies and \$2,250 under the latter "new" policy. Similarly, hospital benefits are increased from \$30 per day plus \$100 per admission for hospitalization under the "old" policies to \$150 per day for the first 90 days and \$400 per day thereafter (under 5GS Ed. 9-89). Also, although some of the benefits in the new policies are not reflected in the 1985 NAIC Cancer Claim Cost Tables, the addition of the hospice and income replacement benefits are in response to the greater responsibility placed upon patients and their families for care outside of the traditional in hospital environment. The hospice benefit in particular is, in my opinion, an excellent example of a more modern cancer policy which reflects the increasing utilization of hospice care in the treatment of cancer.



(c) Considering the "old" policies as a group and the "new" policies as a group, the "new" policies can be expected to provide greater overall dollar benefits to the policyholder than the "old" policies. The greater number of types of expense covered and greater benefits for most all types of expenses provided by the "new" policies compared to the "old" far, far outweigh the effect of any limits applicable under the "new" policies to a few benefits which are not so limited in the "old" policies. This is clear from a review of the indices presented in Exhibit D.

(d) It is conceivable that there might be a relatively few individual cases where because of a particular pattern of expenses a particular patient might receive greater benefits under an "old" policy than under a "new" policy; but it is far more likely that a cancer patient would have greater benefits under a "new" policy. Of course to determine that any particular cancer patient would receive greater benefits under an "old" policy than the "new" policy, one would need to study the particular circumstances involving the nature of the cancer and the treatment provided to that particular patient and the actual charges therefore [sic]. It is clear, however, from the available actuarial data, a policyholder who exchanged an "old" policy for a "new" policy would be far more likely to receive greater benefits under the "new" policy.

7. Not only are the "new" policies better for a typical insured, the offering of "limited" benefit policies by Liberty National is consistent with the coverage offered by competitors of Liberty National. Attached as Exhibit E

is a chart, prepared at my direction and under my supervision, entitled Trade Practices Regarding Limits, Radiation Therapy and Chemotherapy Benefits. As discussed in the Exhibit, forms were sought from the Alabama Insurance Department of the companies which can reasonably be anticipated to be the largest writers of specified disease coverage. Of the two companies for which forms could be obtained, both contain limits. These two companies combined with Liberty National and affiliates account for 5 or half, (77.0% measured by 1988 earned premium) of the top 10 guaranteed renewable writers which presently utilize limits. One of these companies is the acknowledged leader in the field. Also studied were the forms of many of the companies who contributed to the 1985 NAIC Cancer Claim Cost Tables. Other policy forms were also reviewed. Of the 19 companies for which forms were reviewed, 15 utilize a limit or provide no benefit. Of the remaining 4, at least 2 are known to also offer policies with limits (which presents the possibility of treating the no limit policies as a separate premium rating class and protecting the policyholders who select the policies with limits from rate increases likely to follow on the no limit policies). As may be seen from Exhibit F, most of the policies which limit radiation and chemotherapy benefits provide arguably less coverage than the \$500 per treatment day provided by Liberty National. Otherwise stated, Liberty National benefits for radiation and chemotherapy appear comparable or superior to most of its competitors.

8. The "new" policies by utilizing limits, significantly lessen the possible need for rate increases. The concern over the need to increase premium rates due to

escalating medical costs, third party payment, and other factors cannot be over emphasized. With respect to possible financial stress on the companies, the report of the ACLI (American Council of Life Insurance Companies) Task Force on Solvency Concerns dated September, 1990 stated in the final report of its Task Force on Solvency Concerns "Accident and health was identified as a problematic line in 34 of the 41 (78%) companies" and further "underpricing of products was cited in 40 of the 68 (59%) companies examined. Most frequently the underpriced product was some form of accident and health insurance". It is likely that the underpricing result arose in no small part from previously sufficient prices not keeping pace with rapidly increasing costs. As further evidence of the difficulty of maintaining price adequacy in face of escalating cost, most companies have left the field (among them the giants such as Prudential, Metropolitan, John Hancock and others) of individual guaranteed renewable major medical insurance which is a line particularly subject to escalating cost aggravated by difficulty in obtaining needed rate increases. Business which financially stresses companies is detrimental to policyholders and companies alike. With respect to premium rates themselves, from the policyholder's point of view, particularly for a company of the nature of Liberty National and for a coverage such as specified disease, escalating premiums are neither desired by the carrier nor expected by the insured. The utilization of benefit limits is a generally recognized method, and very likely in the circumstances the best one, for addressing this problem.

9. Third party payment (of uncapped benefits) is a significant cause in the rapid rise of health care expense.

For example, the October 4, 1993 issue of the CATO Institute Briefing Papers states in the executive summary "The rise of third party payment has created an incentive structure that makes runaway spending inevitable" and it states further "before 1965, spending on health care was restrained by the fact that most payments were made out-of-pocket by patients". The July 26, 1993 Policy Briefing of the Progressive Policy Institute states "So long as conventional insurance and the current health care system let most Americans use medical services without paying directly for them - demand for health care will never be disciplined and prices will continue to rise".

It is my opinion that the "new" policies are better policies for the foregoing reasons, and they represented a responsible alternative offered by Liberty National to its policyholders.

- See attached Exhibits A - F which are hereby incorporated herein by reference.

/s/ W. H. Odell  
W. H. Odell

Sworn to and subscribed before me on this the 27 day of October, 1993.

/s/ Martha F. Long  
NOTARY PUBLIC

[SEAL]

STATE OF NORTH CAROLINA  
COUNTY OF FORSYTH

My Commission Expires: May 13, 1997

[SEAL] OFFICIAL SEAL  
Notary Public, North Carolina  
COUNTY OF FORSYTH  
MARTHA F. LONG

Exhibit A  
of Affidavit  
of W. H. Odell

W. H. ODELL

ADDRESS: Odell & Associates, Inc.  
Suite A, American Building  
1400 Old Mill Circle  
Winston-Salem, North Carolina 27103

PHONE: (919)<sup>(1)</sup> 768-8217  
FAX: (919)<sup>(1)</sup> 768-2185

EDUCATION: University of Pennsylvania  
Wharton School of Finance and  
Commerce  
B. S. in Economics, 1954  
Hopkins Grammar School, New Haven,  
Connecticut  
Graduated 1950

#### PROFESSIONAL DESIGNATIONS:

1981	Associate, Casualty Actuarial Society
1975	Enrolled Actuary
1975	Fellow, Conference of Actuaries in Public Practice

<sup>1</sup> (910) after November 14, 1993

1965	Member, American Academy of Actuaries
1958	Fellow, Society of Actuaries
1957	Associate, Society of Actuaries

#### PROFESSIONAL POSITIONS AND ACTIVITIES:

1990-	American Academy of Actuaries - Health Practice Council
1988-	ASB (Actuarial Standards Board) - Health Committee
1988-	Conference of Actuaries in Public Practice - Committee on Health Issues, Chairman
1986-88	American Academy of Actuaries - Planning Committee, Chairman
1985-88	American Academy of Actuaries - Planning Committee
1985-86	Conference of Actuaries in Public Practice - Vice President
1984-86	Conference of Actuaries in Public Practice - Task Force on Continuing Professional Education, Chairman
1983-93	Standing Technical Advisory Committee to National Association of Insurance Commissioner's Life, Health and Accident Standing Technical Actuarial Task Force; Health Subcommittee, Chairman
1982-88	Conference of Actuaries in Public Practice - Board of Directors
1981-83	American Academy of Actuaries, Task Force on Actuary/Auditor Relations, Chairman
1980-84	American Academy of Actuaries - Committee on Relations with Accountants
1980-83	American Academy of Actuaries - Board of Directors



- 1980-82 American Academy of Actuaries – Committee on Health Insurance, Chairman
- 1979-83 American Academy of Actuaries – Committee on Health Insurance
- 1979-80 American Academy of Actuaries – Subcommittee on Health and Welfare Plans
- 1974-79 American Academy of Actuaries – Committee on Financial Reporting Principles
- 1967-68 Society of Actuaries – Career Encouragement Committee, Chairman
- 1962-67 Society of Actuaries – Education and Examination Committee (Accounting and Valuation)
- 1961-68 Society of Actuaries – Career Encouragement Committee

Member of regional and local actuarial clubs; have served as editor, secretary/treasurer, vice president and president of regional actuarial club.

#### EMPLOYMENT:

- 1982- Odell & Associates, Inc.  
Winston-Salem, North Carolina  
Consulting Actuary
- 1972-82 Booke & Company  
Winston-Salem, North Carolina  
Senior Vice President  
  
Manage Actuarial Consulting and Education Division.
- 1971-72 Capital Holding Corporation  
Louisville, Kentucky  
Vice President  
  
Integrate and coordinate activities of corporate and subsidiary staffs to service the corporation and subsidiaries by determining liabilities, and making statistical

analyses and reports and providing other actuarial consulting services to subsidiaries.

- 1968-70 Commonwealth Life Insurance Company  
Louisville, Kentucky

Integrate and coordinate the actuarial (and also beginning in 1970) financial control activities of the company and, based upon interpretation and analysis of information emanating from these departments advise and counsel top management on present and future state of the business.

- 1964-68 Life of Georgia  
Atlanta, Georgia

Direct conversion to 1958 CSO, preparation of new merchandise and ratebook, annual statement preparation, development of Group Annuity Merchandise.

- 1954-64 Prudential Insurance Company of America  
1959-64: Jacksonville, Florida

Assist in directing the underwriting and servicing of individual life, individual health, and small group.

- 1954-59: Newark, New Jersey

Management Development Program and Actuarial Development Program. Group insurance responsibilities,

development of premium billing and accounting system, development of individual health insurance asset share system.

#### PAPERS AND OTHER MATERIALS:

##### Transactions of the Society of Actuaries:

Vol. XXXI, 1979. Discussion, "The Individual Accident and Health Loss Ratio Dilemma", p. 390.

Vol. XXVII, 1975. Discussion, "Accounting for Purchase of a Life Company", p. 363.

Vol. XX, 1968. Discussion, "Adjusted Earnings", p. 477, p. 482.

Vol. XX, 1968. Discussion, "Actuarial Clubs", p. 771.

Vol. XIV, 1962. Discussion, "Individual Life Insurance", p. 222.

##### Record of the Society of Actuaries:

Vol. 1, Number 2. 1975. Panel Discussion, "Ordinary Pricing, Product, and Marketing Adaptations to an Inflationary Economy", p. 231.

##### Proceedings of the Conference of Actuaries in Public Practice:

Vol. XXV, 1975. Paper, "Establishing Reserve Systems for Use in Financial Statements Prepared in

Accordance with GAAP Reflecting Purchase Situations", p. 96.

Vol. XXV, 1975. Panel Discussion, "Purchase Accounting and GAAP", p. 95, p. 130 ff.

Vol. XXII, 1972. Workshop, "Adjusted Earnings", p. 312.

##### Proceedings of the Insurance Accounting and Statistical Association:

1974. "Federal Income Tax", p. 40.

#### OTHER PUBLICATIONS:

November, 1976. BEST'S INSURANCE REVIEW, Article, "The Quarterly Earnings Roller Coaster", p. 20.

June, 1975. THE ACTUARY, Book review of "Ernst & Ernst GAAP Accounting", by Robert Posnak, p. 1.

#### EXPERT TESTIMONY

##### Includes the following:

1. State of North Carolina on Relation of John Randolph Ingram, Commissioner of Insurance of North Carolina vs. All American Assurance Company - 75CVS8015 - Superior Court Mecklenburg County, North Carolina - on behalf of Plaintiff (North Carolina).

2. National States Insurance Company vs. Commissioner of Internal Revenue – Tax Court, St. Louis – Docket 17289-79 – on behalf of Plaintiff (National States).
3. Hearing before U. S. Senate Judiciary Committee's Anti Trust, Monopoly and Business Rights Subcommittee, June 16, 1980.
4. American Family Life Assurance Company vs. Joseph P. Teasdale, U. S. District Court Western Division, Case No. 81-0317-CV-W-5 1983 on behalf of Plaintiff (American Family).
5. Oxford Life Insurance Company vs. United States of America (IRS) – U. S. District Court for the District of Arizona – on behalf of Defendant (IRS).
6. Barnett Bank of Jacksonville vs. State Mutual Life Assurance Company of America – U. S. District Court Middle District of Florida Case No. 77-402-DIV-J-WC 1983 on behalf of Defendant (State Mutual).
7. State of North Carolina on relation of James E. Long, Commissioner of Insurance vs. 20th Century Life Insurance Company – State of North Carolina, Wake County General Court of Justice, Superior Court Division Case No. 90CVS 10926 on behalf of Plaintiff (North Carolina/James E. Long).

Exhibit C  
of Affidavit  
of W. H. Odell

#### SUPPLEMENTARY REFERENCES

The primary reference was the NAIC data, together with experience, judgment and information available in the normal course of our business. This was supplemented by the sources indicated below.

American Council of Life Insurance, *Report of the ACLI Task Force on Solvency Concerns*, September 1990.

A National Underwriter Publication, *Argus Health Chart 90th Annual Edition*, 1988.

National Center for Health Statistics, *Vital and Health Statistics, Detailed Diagnoses and Procedures, National Hospital Discharge Survey*, 1989, September 1991.

Health Care Financing Administration Office of Research and Demonstrations, *Total Family Expenditures for Health Care United States*, 1980, September 1987.

American Medical Association, *CPT, 1993 (Physicians' Current Procedural Terminology)*, October 1992.

American Medical Association, *CPT, 1993 (Physicians' Current Procedural Terminology)*, Radiology, 1992.

Official Medical Fee Schedule, *For Services Rendered Under The California Workers' Compensation Laws*, October 1987.

Commerce Clearing House, Inc., *Physicians' Medicare Fee Schedule*, January 1992.

Brink Lindsey, *Patient Power: The Cato Institute's Plan for Health Care Reform*, Cato Institute, October 4, 1993.

Progressive Policy Institute, *Policy Briefing: Health-Care Reform and the Laws of Economics*, July 26, 1993.

Exhibit D  
of Affidavit  
of W. H. Odell

#### INDEX NUMBERS (RELATIVITIES)

This reflects a means by which the aggregate benefits of each set of policies could be ranked in relation to the others using those issued on Form 579-11-75 as a standard. We utilized, as requested, a system of point values for this purpose.



This was requested for two time periods, 1986-1990, which we represented by July, 1988 and the "present" which is taken as July, 1993.

The following table presents index numbers or relativities indicating the relative value of the aggregate benefits of each set of policies. Form no. 579-11-75 is assigned an index of 1.000. The index number determined for each of the other Forms indicates the relative value of the benefits of policies issued on the specified Form to the aggregate benefits of those issued on Form 579-11-75.

For example, for July, 1988, the index number of 2.289 for Form 5GS Ed. 8-89 indicates the aggregate value of its benefits is 2.289 times that of Form 579-11-75.

<u>Plan</u>		<u>Index Number</u>	
		July, 1988	July, 1993
579-11-75	"old"	1.000	1.000
7023	"old"	1.235	1.190
5GJ Ed. 8-86	"new"	1.828	1.503
5GS Ed. 9-89	"new"	2.289	1.854

Summary Indicators of Liberty National Life Insurance Company  
Policy Forms - See policy forms for actual benefit provisions

	1 C 579-11-75	1A A 629-1-79	2 D 7023	3 B 5GJ ED 8-86	4 E 5GS ED 9-89
1. First Occurrence	--	--	--	\$2,000	\$2,250
2. Hospital					
Per Admission	\$100	\$100			
Per Day	\$30	\$30	\$60	DYS: 1-90 \$100 >90 \$250	\$150 \$400
3. Out Patient Surgery	--	--	--	\$100	\$150
3A. Ambulatory Service Center	--	\$100/Dy	\$100/Dy	--	--
4. Radiation and Chemotherapy	Charges including Chemotherapy Hosp or Doctor	+ )	+ New Language )	Chemo, Hosp, Other Admin by Doc. or Nurse \$500/Treatment Dy	+ )
5. Chemotherapy Prescription Drugs	† --	† --	† --	\$8,000/Yr	\$10,000/Yr
5A. Drugs	U & C Prescribed Drugs Excl Admin in Hosp	+ --	-- Prescribed Drugs Excl Admin in Hosp	--	--

• Above simplified and summarized for presentation.

• Amounts shown are maximum payments except First Occurrence is an indemnity amount.

Summary Indicators of Liberty National Life Insurance Company  
Policy Forms - See policy forms for actual benefit provisions

	1 C <u>579-11-75</u>	1A A <u>629-1-79</u>	2 D <u>7023</u>	3 B <u>5GJ ED 8-86</u>	4 E <u>5GS ED 9-89</u>
6. Experimental	--	--	--	--	Recognized
7. Blood Transfusion	U & C	+	U & C	+ \$500 Each	+ \$750 Each
8. Transportation	U & C 6 in 12 months	+	+	+Expanded 15¢	+
9. Surgery	\$400 Schedule	+	\$800 Schedule	\$1,000 Schedule	\$2,000 Schedule
10. Anesthesia	\$75/Operation	+	\$100/Procedure	25% Surgery	+
11. Attending Physician	\$10/Dy Excl Surg RAD	+	\$15/Dy	\$25/Dy	\$35/Dy
12. Private Nurse	\$25/Dy	+	\$30/Dy	\$50/Dy	\$75/Dy
13. Prosthesis	--	--	--	2 Lifetime \$500 Each	2 Lifetime \$750 Each
14. Hospice	--	--	--	\$50/Dy of Service	\$75/Dy of Service
15. Income Replacement	--	--	--		14 Dy, \$100/Wk, 26 Wks +
16. Dread Disease	--	--	--		R&B Only +



Exhibit F  
of Affidavit  
of W. H. Odell

TRADE PRACTICES REGARDING LIMITS  
RADIATION THERAPY & CHEMOTHERAPY LIMIT

This Exhibit presents information about benefit limits in the policies of some of Liberty National's competitors.

To provide an objective sample of this information, a review was made of the filings with the Alabama Department of Insurance on companies selected based upon the criteria of likelihood of being a significant presence in the specified disease policy market. These companies were defined as those companies listed by Argus Health Charts as being the largest writers of guaranteed renewable health insurance. Although other health insurance coverages besides specified disease are written on the guaranteed renewable basis, a very significant portion of the guaranteed renewable business is specified disease. Inquiry was made of the Alabama filings of these companies commencing with the largest writer of guaranteed renewable business and proceeding down the list, omitting affiliates of Liberty National.

The following table lists in the first column the 10 largest writers of guaranteed renewal (excluding Liberty National and its affiliates) according to Argus Health Charts and the second column indicates by "yes" whether there are any policy forms available on file. For both top ten companies for which filings were available, all Alabama specified disease filings of the last two years were selected for study. (Two years is the Alabama Department

of Insurance's retention period for policy filings' correspondence.)

<u>Company</u>	<u>Forms Available</u>
1. American Family Life ASR GA	Yes
2. Bankers LNC, IL	No
3. Physicians Mutual	Yes
4. Colonial L&A	No
5. Combined Ins of America	No
6. Mutual of Omaha	No
7. American Republic	No

United American and Globe L&A Ins rank second and ninth respectively but are omitted because they are affiliates and Liberty National which ranks seventh. The above listing, therefore, together with Liberty National and its affiliates, account for the ten largest writers of guaranteed renewable health coverage in the nation.

In addition to the forms selected by the above procedure, other forms which were available from the Alabama Department of Insurance and from other sources were reviewed. Some of these forms were issued by the above companies.

TRADE PRACTICES REGARDING LIMITS  
RADIATION THERAPY & CHEMOTHERAPY LIMIT

Radiation Therapy  
and Chemotherapy  
Benefit Limit

<u>Company</u>	<u>Form</u>	<u>Radiation Therapy and Chemotherapy Benefit Limit</u>
American Family, GA	A-4474	\$1,000 lifetime
American Family, GA <sup>(2)</sup>	A-9056	\$2,500 lifetime
American Family, GA <sup>(1)</sup>	A-51000 to 55000	\$100 to \$250 per treatment day
American Fidelity, OK	C-5	No Limit
American Heritage, FL <sup>(1)</sup>	CP6 & CP9	No Limit
American Heritage, FL <sup>(1)</sup>	CP10	\$5,000 to \$10,000 per year
American Heritage, FL <sup>(1)</sup>	CP11	\$5,000 per year
Bankers Life & Casualty, IL <sup>(2)</sup>	GR-754	\$1,000 lifetime (\$100/treatment)
Bankers Life & Casualty, IL <sup>(2)</sup>	GR-77B	\$5,000 for all care

Company	Form	Radiation Therapy and Chemotherapy Benefit Limit
Bankers United, IA	CZ 1 877	\$2,000 lifetime
Bankers United, IA	CC 41 1284	\$3,000 per year
Bankers United, IA	C5 1 985	No Limit
Bankers United, IA <sup>(1)</sup>	BPC 400	No Limit
Bankers United, IA <sup>(1)</sup>	BPC 510	No Limit
Capitol American, AZ	SD-82	\$1,250 per year
Capitol American, AZ	ZQ000	\$3,750 per calendar year
Capitol American, AZ <sup>(1)</sup>	CG---	to No Limit
Capitol American, AZ <sup>(1)</sup>	CH---	\$75 to \$250/treatment day
Certified Life, CA <sup>(2)</sup>	CER-77D	\$100 to \$300/treatment day
Colonial Life, SC <sup>(2)</sup>	NCBA-NC	\$10,000 for all care
		\$150 per outpatient treatment day
Kanawha, SC	70220 5/89	\$150 per treatment day
Life Investors, IA	CC 2 279	\$2,500 lifetime

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Company	Form	Radiation Therapy and Chemotherapy Benefit Limit
Lone Star, TX <sup>(2)</sup>	GR3-056 (71)	\$1,000 lifetime
Lone Star, TX <sup>(2)</sup>	SPC GR 100-CAL (73)	\$1,500 lifetime
Mutual of Omaha, NE <sup>(2)</sup>	50CL/CLF	All care subject to maximum <sup>(3)</sup>
Mutual of Omaha, NE <sup>(2)</sup>	70CL/CLF	No Benefit
Mutual of Omaha, NE <sup>(2)</sup>	80CL/CLF	\$2,000 lifetime
National Foundation, TX <sup>(2)</sup>	CP 1904	\$1,500
National Foundation, TX <sup>(2)</sup>	1911 (7/77)	No Benefit
Pacific Fidelity, CA	SD 1 581	\$3,000 per policy year
Physicians Mutual, NE <sup>(1)</sup>	P180	\$1,500 to \$6,000 lifetime
Security First, AL	CPP-150R70	\$1,000 lifetime
Standard Life, OK <sup>(1)</sup>	1264-693	\$2,400 to \$4,800 per calendar year
Union Fidelity, PA <sup>(2)</sup>	1-2140-04	\$1,500 lifetime

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Company	Form	Radiation Therapy and Chemotherapy Benefit Limit
Liberty National	579--11-75	No Limit
Liberty National	7023	No Limit
Liberty National	5GJ Ed. 8-86	\$500/treatment day
Liberty National	5GS Ed. 9-89	\$500/treatment day
Summary Data:		
	<u># Companies</u>	
Limit or No Benefit	15	
No Limit	2 (American Fidelity & Bankers United)	
Both	2 (American Heritage & Capitol American)	
Total	<u>19</u>	

Both of the two top ten companies in the sample for which forms could be obtained, offered only limited coverages. One of these, American Family, is the acknowledged pioneer and leader in the field. Together with Liberty National and affiliates, this accounts for 5 or half (77.0% of the 1988 earned premium,) of the top 10 guaranteed renewable writers companies as presently utilizing limits.

- (1) Form obtained from Alabama Department of Insurance.
- (2) This company contributed to the experience study which is the basis for the 1985 NAIC *Cancer Claim Cost Table* and it is believed that this form was the basis for part of the experience contributed by that company.
- (3) All benefits combined subject to selected maximum during a 5 year benefit period (maxima offered not included in information available).

IN THE CIRCUIT COURT OF  
BARBOUR COUNTY, ALABAMA  
CLAYTON DIVISION

CHARLIE FRANK ROBERTSON,	)	
individually and on behalf of	)	
a class,	)	
	)	
Plaintiffs,	)	Civil Action No.
	)	92-021
v.	)	
	)	
LIBERTY NATIONAL LIFE	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	
STATE OF GEORGIA	)	
FULTON COUNTY	)	

**AFFIDAVIT OF ROBERT H. DOBSON**

Before me, the undersigned Notary Public in and for said county in said state, personally appeared Robert H. Dobson, who being known to me and having been by me first duly sworn under oath, deposes and says as follows:

1. My name is Robert H. Dobson. I have personal knowledge of the matters set forth in this affidavit based upon my education, my experience as an actuary, my experience in the insurance business, and based upon materials I have reviewed and work I have performed relating to cancer policies of Liberty National Life Insurance Company ("Liberty National"). My education, professional experience and qualifications as an actuary include the following:

a. I am employed as a consulting actuary with the firm Milliman & Robertson, Inc. in its office in Atlanta, Georgia. Milliman & Robertson, Inc. is a national firm specializing in the field of actuarial consulting in the insurance industry, with international affiliations through Woodrow Milliman. Our clients include both governmental agencies and private entities in the United States and other countries.

b. I graduated from the Massachusetts Institute of Technology in 1969 with a Bachelor of Science degree in economics. After graduation I worked in the actuarial field for insurance companies until 1973 when I formed an actuarial consulting firm, which later merged with Milliman & Robertson, Inc. I worked as a consultant from 1973 until 1981, during which time I became more specialized in the medical and health insurance area, and by the end of that period I was concentrating almost completely in the field of medical and health insurance. During that period of time our clients included Blue Cross and Blue Shield plans in different states, the Alabama Department of Insurance, Florida Farm Bureau Life and other private and governmental entities in the insurance field.

c. In 1981, I joined Blue Cross and Blue Shield of Alabama as its Chief Financial Officer. I had several departments reporting to me, including actuarial, underwriting, accounting, corporate planning and provider reimbursement; toward the end of my time at Blue Cross and Blue Shield of Alabama I was also in charge of the Plan's health maintenance organization. I served as Chief Financial Officer of Blue Cross-Blue Shield of Alabama until 1984 when I returned to the consulting field with

the firm of Tillinghast, where I later became a principal. Tillinghast merged with Towers Perrin in 1986 and I was promoted to Vice President. In 1992, I rejoined the consulting firm of Milliman & Robertson, Inc. in their Atlanta office.

d. I have had experience in all aspects of risk analysis in the financing and delivery of health care, and I have been retained as a consultant for insurance companies, Blue Cross and Blue Shield plans, health maintenance organizations, preferred provider organizations, health care providers, state insurance departments, major employers, various associations and agencies of the federal government. I am a Fellow of the Society of Actuaries, a Fellow of the Conference of Consulting Actuaries and a member of the American Academy of Actuaries. I have chaired and served on various professional committees responsible for health insurance and other insurance matters, including serving as President of the Conference of Consulting Actuaries and Vice President of the American Academy of Actuaries.

e. I have been retained as an expert in connection with litigation and administrative proceedings by various private and governmental entities, including the Alabama Department of Insurance, the Vermont Department of Insurance, the Maryland Attorney General, the Ohio Insurance Department, the Florida Department of Insurance, the New Hampshire Department of Insurance, Blue Cross of Maryland and others. On two different occasions I have testified before congressional committees of the United States Congress, once regarding proposed changes to Medicare and once regarding long term care coverage.

f. I reside in Atlanta, Georgia, and my business address is Milliman & Robertson, Inc., Atlanta Financial Center, 3343 Peachtree Road, N.E., Suite 1250, Atlanta, Georgia 30326-1052.

2. I was retained as a consultant by counsel for Liberty National to review certain Liberty National cancer insurance policies issued on and after August 1986 (the "new policies") and compare those cancer policies with Liberty National cancer policies issued prior to August 1986 (the "old policies"). I was asked to determine the relative value of the benefits under the old policies and under different forms of the new policies. By applying basic actuarial applications and utilizing sources of data which were appropriate in ascertaining the relative values of the benefits, I determined the relative value of benefits under the old policies and the new policies at different points in time. In my opinion the new policies provide benefits which are greater in actuarial value than the old policies. That is, for a given population of people with average risk characteristics, analyzed at the different points of time I considered, such population would be expected to receive greater total benefits under the new policies than the under the old policies, and, at the time of purchase, the average member of such population would expect to receive more total dollars in benefits under the new policy than he would under the old policy if that member suffered cancer.

3. Specifically, I reviewed two old policies designated as 579 and 7023 and two new policies designated as 5GJ and 5GS, copies of which are attached hereto as Exhibits A, B, C and D respectively. I compared these four policies at two points in time, July 1, 1988 and July 1,



1993, and I used the old policy designated 579 as the base. By applying my training, experience and basic actuarial applications, and utilizing appropriate data for this analysis, I arrived at the relative value of each of the benefits which were provided in each of these policy forms. By performing various calculations and computations which were appropriate for this analysis, and which are accepted practice in the actuarial field, I determined the relative values of the overall benefits of each of these four policies, using the value of 1,000 as the base value for policy 579. A summary of the results of this comparison is as follows:

	<u>7/1/88</u>	<u>7/1/93</u>
579	1,000	1,000
7023	1,140	1,080
5GJ	1,530	1,150
5GS	1,860	1,340

As can be seen from this summary, I determined, for example, as of July 1, 1988, new policy 5GS had a relative value of 1,860 as compared to the value of 1,000 for old policy 579. In other words, I determined that as of July 1, 1988, new policy 5GS had a relative value of benefits which was 1.86 times greater than the value of benefits under the old policy 579. The other comparisons can be seen in the summary chart above.

4. Subsequent to being asked to review the four policies discussed above, I was retained to review one old policy form designated as 564 and two new policy forms designated as 5GL and 5GR to determine relative values

of benefits for a female who was age 55 on 7/1/87. I made this comparison for three different points in time, 7/1/87, 7/1/91 and 7/1/92. Applying my training, experience and basic actuarial applications, and utilizing appropriate data for this analysis, I arrived at a relative value of each of the individual benefits which were provided in each of these policy forms. Through various calculations and computations which are appropriate to the comparison of the policies, and which are accepted practice in the actuarial field, I arrived at relative numbers or values for these benefits and then arrived at a relative value for the overall benefits of each of the three policies. I performed this analysis at each of the three points in time. The policies used in this analysis were Liberty National form 564 (one of the old policies), Liberty National form 5GL and form 5GR (two of the new policies). Copies of policy forms 564, 5GL and 5GR are attached hereto as Exhibits E, F and G. Attached hereto as Exhibit H is an exhibit which summarizes the results of my analyses and comparison of benefits. As is shown in Exhibit H, I determined, for example, that by assigning a relative value of 1.00 to the benefits provided under old policy form 564, as of 7/1/87 the new policy form 5GL would have a relative value of benefits of 1.47. Simply stated as of 7/1/87, new policy form 5GL, for example, had a relative value of benefits 1.47 times greater than the benefits in old policy form 564. The other ratios of relative values of the different forms at the three different points in time are also reflected in Exhibit H.

5. In performing my analyses of the various policy forms discussed in the preceding paragraphs, I relied in part upon the 1985 NAIC cancer study, which is an

authoritative study sponsored by the National Association of Insurance Commissioners. I also relied in part upon other sources of reliable data, including data known as the Nelson & Warren Tables and also certain reliable internal data of Milliman & Robertson which we regularly utilize in performing actuarial consulting work in the field of health insurance.

6. The new policies provide certain significant benefits which were not provided at all under the old policies, and the new policies provide for increased benefits in certain areas which were also covered under the old policies but with lesser benefits. As indicated by my findings as to the relative values of the benefits under the old policies versus the new policies, in my opinion the new benefits and the increased benefits under the new policies more than offset the limitations placed on radiation and chemotherapy and the lack of coverage for non-cancer fighting prescription drugs in the new policies, resulting in my conclusion that the new policies provide greater overall benefits and coverage. In my opinion, a given population of policyholders (and, at the time of purchase, each member thereof) can expect to receive greater overall benefits under the new policy forms than under the old policy, and the average person who suffers cancer after purchasing a new policy will receive more total dollars in benefits under the new policy than would have been received under the old policy for the same treatment.

7. The methodologies I have employed are generally accepted in the actuarial field and are appropriate for the analysis I performed. In my professional judgment it would not have been actuarially sound to use Liberty

National claims data from the old policies and compute the average amount of claims paid per policy and then compare those amounts to the average amount of claims paid per policy under the "new policies" to determine which was the better policy, for the following two reasons: (1) the two groups of policyholders do not represent homogeneous populations; and (2) risk is involved, which means that actual experience for any given time period will differ from expected, especially given the low frequency of cancer claims. For example, in a given population of 100 policyholders, it is highly likely that the number of internal cancers will be either 0, 1 or 2. If one policy form provides a flat benefit of \$1,000 and a second provides a flat benefit of \$1,500, it is clear that the latter form is more valuable to any individual policyholder. However, it could easily happen that the first group had 2 cancers occur in a given year for a total payout of \$2,000. If the latter group had 0 or 1 cancers for a payout of 0 or \$1,500, the fallacious reasoning referenced above would lead to the erroneous conclusion that the first policy was better. This conclusion is not actuarially sound.

In my opinion, it was more appropriate to rely on independent sources such as the NAIC Tables and our own internal data and professional judgment. In addition, the new group of policyholders had been underwritten, and Liberty National prohibited anyone in the old group who had cancer or who had ever had cancer from exchanging to a new policy.

8. Further deponent sayeth not.

/s/ Robert H. Dobson  
Robert H. Dobson

Sworn to and subscribe before me on this the 28th  
day of October, 1993.

KIMBERLY H. SCHRINER  
Notary Public, Fulton County,  
Georgia  
My Commission Expires April 2,  
1996

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Notary Public



**Liberty National Life**  
**Evaluation of Cancer Policies For Female Age 55 on 7/1/87**  
**Done For Relativities, Not Absolute Values**

	<u>As of 7/1/87</u>		<u>As of 7/1/91</u>		<u>As of 7/1/92</u>	
	<u>564</u>	<u>5GL</u>	<u>5GL</u>	<u>5GR</u>	<u>564</u>	<u>5GR</u>
First Occurance Benefit	0.00	15.60	18.88	21.24	0.00	22.26
Hospital Per Day	14.13	25.49	25.13	38.02	13.81	37.69
Surgery	4.43	4.43	5.40	8.64	5.67	9.07
Anesthesia	0.66	1.11	1.35	2.16	0.81	2.27
Prescription Drugs	3.69	0.00	0.00	0.00	4.78	0.00
Radiology & Chemotherapy	38.11	33.53	54.35	54.35	80.36	61.57
Attending Physician	1.65	2.74	3.44	4.82	2.17	5.06
Blood	0.94	0.94	1.24	1.24	1.31	1.31
Private Duty Nursing	0.08	0.14	0.18	0.27	0.11	0.28
Transportation	0.13	0.13	0.19	0.19	0.21	0.21
Outpatient Surgery	0.42	0.42	0.70	1.05	1.15	1.73
Prostheses	0.00	0.95	1.13	1.69	0.00	1.69
Hospice	0.00	1.07	1.30	1.95	0.00	2.04
Income Replacement	0.00	5.29	7.32	7.32	0.00	7.84
Dread Disease	0.00	2.55	2.51	3.80	0.00	3.77
Experimental	0.00	0.00	0.00	1.18	0.00	1.27
<b>Total</b>	<b>64.24</b>	<b>94.39</b>	<b>123.12</b>	<b>147.92</b>	<b>110.38</b>	<b>158.06</b>
<b>Ratio</b>	<b>1.00</b>	<b>1.47</b>	<b>1.00</b>	<b>1.20</b>	<b>1.00</b>	<b>1.43</b>

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**Liberty National Life**  
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[p. 234] THE COURT: Whichever way you want to do it.

MR. ROEDDER: We will do it back to back.

(THEREUPON, a short discussion was held off the record.)

CHAMP LYONS, JR.

the witness herein, after first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BEASLEY:

Q State your name, please.

A Champ Lyons, Jr.

Q Mr. Lyons, who do you practice law with?

A Give me a second to get this mike where it is more comfortable. Helmsing, Lyons, Sims, & Leach in Mobile.

Q For how many years have you practiced?

A I graduated from law school in '65, and clerked for Judge Dan Thomas for two years and I have been in private practice since.

Q Okay. You have actually lectured and written and authored various things, legal publications and things of this sort? Am I correct?



A That's correct.

Q How many separate policyholders are there that you believe them to be members of the class that have been [p. 235] defined by the court?

A I think the number is 220,000 or 270,000, I'm not sure.

Q How many are represented by attorneys other than class counsel to your knowledge?

A I'm not the best person to ask that. I'm really not sure.

Q Who would be the best person to ask that?

A I think we could probably get information from the counsel table or stipulation basis or something like that.

Q If we could do that. I may want to ask somebody that particular question. How many policyholders does your firm represent?

WITNESS: Larry, how many do we represent?

MR. SIMS: I think we represent approximately two hundred.

Q Two hundred? What is the nature of claims that two hundred persons have, just the general nature?

A Well, as far as I understand it is cancer and noncancer cases.

Q Fraud type cases, though?

A Right.

Q Do you intend at this point - assuming the court didn't approve this settlement and allowed for [p. 236] persons to file individual lawsuits, would you seek both compensatory damages and punitive damages for each of those 250 people?

A Assuming that this matter can't be resolved on some basis where we find the quid pro quo for our right to opt out then we would go back in our trial courts seeking jury trials.

Q The question I'm asking would you, though - would you seek both compensatory damages and punitive damages for each of the policyholders that you represent in your firm?

A Yes, sir.

Q Do you see any problem with that as far as the punitive aspect of it would be concerned as a legal scholar and an attorney who is widely experienced in litigation practice?

A I think what you are asking me is to address this concept of the greater good that my friend Richard Gill referred to.

Q Not really. The question I'm asking you, do you see any problem in having two hundred separate clients all seeking punitive damages against a company that has a net worth of \$327 million?

A It would be a matter that we would work out with our clients.

[p. 237] Q You would work it out with each individual client?

A Yes.

Q Have you advised each of the clients that would be a potential conflict in representing 200 clients?

A My role in this has not been involved in dealing with the clients directly.

Q Assume your firm has dealt with them.

A I assume they have.

Q I would just like for you to tell the court what you told the clients.

A I can't tell you that because I haven't dealt with the clients.

Q Who would have that information?

A Other members of the firm who have.

Q Mr. Sims?

A Yes, sir.

Q I'm asking you now do you see a problem with that?

A I already told you it would be something that would have to be worked out.

Q Well, for example, would you tell the client that, "One of you may get \$10 million, one of you may get nothing; that at some point the Supreme Court may say that Liberty National has been punished enough and we will have [p. 238] to stop this and there will be no other punitive damages allocated to any other respective client"?

A That is one thing you could tell them.

Q Would you tell them also if you have, say, three or four multiple million dollar verdicts that Liberty National could wind up in receivership?

A That is also possible. That is something one could tell them.

Q That would be something also that the class counsel would have to look at too in representing a class; is that correct?

A That is a factor.

Q Would it not make injunctive relief perhaps more acceptable to members of the class?

A Well, you and I have a conceptual difficulty with the ability of the litigant to characterize this as injunctive relief and thereby escape the right to trial by jury that is available to an Alabama citizen.

Q Well, let ask you this: What assets are available to take a judgment against Liberty National other than what is shown on their financial statement?

A Well, I haven't had any discovery to speak of. All we have is statements to net worth, but they do have some insurance coverage which is in litigation.

Q In fact, that is \$10 million, am I correct?

[p. 239] A I don't know. I haven't seen that.

Q You haven't seen the declaration page in that policy that has been introduced in a lawsuit in Mobile?

A I didn't try the lawsuit in Mobile.

Q No, I'm talking about the lawsuit that was filed by the insurance carrier.

A No, I'm not involved in that litigation either.

Q Okay. Now, what profits do you believe Liberty National made because of the problem, and I'll concede this question to you that I think the fraud in this case is monumental.

A Well, without discovery I can't answer that.

Q Well, in this case, the judge asked Mr. Gill the question I'm going to ask you. First of all, do you say that the \$3 million separate pot is inadequate for punitive damages if that was the nature of it?

A Well, I'm glad you put if that was the nature because there is nothing in the settlement document that I have seen that characterizes that as punitive damage fund.

Q Assuming that were the amount of money that was in addition to the injunctive relief and the relief that you can't just put a particular dollar figure on, what amount - I will just ask you is that amount adequate to fit what you read in the settlement agreement and also in the notice that will go to the people who will be covered [p. 240] by that class? Is it adequate or inadequate?

A I would answer it this way: I would think after discovery if one had a pretty firm grasp as to the profit level, that has been obtained by Liberty National from this, which you call monumental fraud, that that class would be reduced by a third for the hazard of litigation, and that would be the punitive damage award.

Q Assume for the purpose of this question that the property is worth \$30 million from this fraud, that the net worth of the company is in fact \$327 million, and add another \$10 million for insurance coverage, and assume that the fraud is the worst you ever saw as a practicing attorney, then do you think \$3 million adequate or inadequate?

MR. GEWIN: I just have to object to the form, assuming it is the worst fraud he ever saw.

MR. BEASLEY: I'll strike that part of the question and leave everything else intact. Let's say that the fraud is bad.

MR. GEWIN: Same objection. I know this is not a trial, Judge, but you know my position. This is a -

MR. BEASLEY: (Interposing) I'll strike that and I'll just say fraud is involved.

A Let me make sure I understand your question. [p. 241] Assume \$30 million profits -

Q (Interposing) From the fraud -

A - from the fraud.

Q - assuming that fraud did occur.

A And assuming another \$10 million in insurance -

Q (Interposing) That's correct.

A - and the question to me is if an allocation of \$3 million punitive damage award in this settlement was fair.

THE COURT: Why don't you go ahead and put the other factors - what the total settlement -



MR. BEASLEY: (Interposing) The total value of settlement of \$39.4 million, assuming that is correct.

A Well, I have some problems with that, but I still think it is unfair. Compensatory damages may be one thing and then punitive damages is another, and I think that you ought to be able to recover a punitive damage award over and above what it would take to make the individual class members whole.

Q I told you that. The question I'm asking you is do you think that the \$3 million is not enough?

A No, I said no, it is not enough.

Q So, I'll ask the question that the judge asked [p. 242] Mr. Gill: What amount do you believe that the Alabama Supreme Court would say is fair enough to punish them, assuming the fraud, conceding that the question is correct, just simply for the hypothetical?

MR. GEWIN: May we have the understanding that that question includes the total settlement package?

MR. BEASLEY: Yes.

Q What would it take in your opinion for the Alabama Supreme Court to say, "This is enough, you have been punished enough, and nobody else will get any further damages of a punitive nature"?

A Well, that is a hard question to answer, but I'll stick to what I said earlier, you take two-thirds of the profits, under your hypothetical, and they have got \$10 million in insurance, \$25 or \$30 million.

Q So \$10 million you are saying is not punishment because the insurance would take care of that?

A Yes.

Q An additional two-thirds of the profits would be -?

A Twenty more million under that hypothetical.

Q That is the question I wanted you to answer.

Now, if I understand correctly, one case in Mobile was tried before a jury, and that person, as I understand it, did not have a cancer claim; am I correct?

[p. 243] A That is my understanding.

Q And tell the court what the award was in that case.

A It was my understanding that person also had other cancer coverage so there was no mental anguish claim, and I think the actual damages in that setting a thousand dollars.

Q And the punitive?

A Was a million.

Q Do you believe if each case went to trial and assuming that the plaintiff won the case, do you believe that each member of this class would recover and receive one million dollars?

A No, because we would have a Green Oil curtain drop before that happened.

Q Explain to me, the court already knows, what the Green Oil curtain drop is.

A Well, I won't accept your statement you don't know what Green Oil is.

THE COURT: I won't either, not as many hearings as I've had with him before.

A The Alabama Supreme Court has created a post verdict review procedure whereby jury verdicts are tested for excessiveness in the context of the punitive damages on a variety of factors which I can't tick off right now, but [p. 244] essentially there is a provision in there for review of punishment in other cases so you can avoid the Constitutional challenge to multiple punishments for a single wrong beyond the degree of the enormity of the wrong.

Q Have you ever taken the position in a legal brief that a certain number of dollars punitive damages would be excessive?

A Yes.

Q In fact, you have taken the position of much less than \$3 million in a fraud case?

A Well, I have been involved in several. If you want to refresh me which one -

Q (Interposing) I can't remember the name, I read so many of them, would I be accurate if I characterized it many times you have taken that position haven't you?

A In a setting where you got a single fraud before the court, and this is a single wrong, and I'm not purporting to deal with a bigger picture, yes, but I have on occasions.

Q Now, have you ever taken the position before that a certain amount was not enough punitive damages ever in your legal career?

A No, I haven't.

[p. 245] Q How many times has your law firm represented a plaintiff in a fraud case against an insurance company?

A Outside the two hundred cases against Liberty National?

Q Well, I assume that those are in abeyance at this point awaiting the outcome of this. I'm talking about where you actually included -?

A I am sure on several occasions, I just can't recall.

Q Can you name one? I'll make it easy. Can you name one that you handled personally?

A Fraud case against an insurance company?

Q For the plaintiffs.

A For the plaintiff? No.

Q Now, am I correct that - well, let me ask you this: In the Mobile setting, again in a separate situation with a separate judge, am I correct that another judge on similar facts granted summary judgment for Liberty National against six individual policyholders, that those cases are gone unless it is reversed?

A I don't know how you can same similar fashion. I don't know there was a claim for mental anguish damages in those cases.

Q Do you know what the basis of the summary judgment ruling was?

[p. 246] A Yes, I do.

Q Tell the court.

A It is my understanding that Judge McRae felt a person who had not yet filed a claim did not have actual damages because it would be speculative, and I think that is quoted in one of the briefs. I think he has misread the rule that says where damages are difficult to prove that the defendant shouldn't get off scott-free, and made an application of the rule of speculative damages in that setting; therefore, I think that judgment should be reversed.

Q All right. Champ, do you see in this case, assuming that we had maybe five multimillion dollar awards against Liberty National on the cancer policies, would receivership be a possibility?

A Well, you can have it with one multimillion dollar award. I don't know. That is a very open question.

Q Let's assume there are five cases that are tried out of class numbers that escaped this class, and go the individual route and file suit, and assume that the person gets five million and the next one gets one million and the next one gets three million and the next one four million, and the next one one, do you believe that would be enough for the Alabama Insurance Department to place this company in receivership?

[p. 247] A I'm not an expert on insurance laws.

Q Have you considered that possibility in dealing with two hundred clients?

A I have considered it a possibility. You have asked me where the threshold is. I can't tell you that.

Q Do you not have, based on what the Alabama Supreme Court has done in recent fraud cases, you don't have a general idea as to what their opinions are on the aggregate amount of money required to punish an individual?

A That is a different question. I thought you asked me about the amount of money necessary to put it in receivership.

Q Do you think one would be lesser or larger than the amount to put a company in receivership as opposed to what the Supreme Court would find -

A (Interposing) Well it depends on the size of the company.

Q Excuse me, the accumulative aggregate had reached the magic "punishment level". A company of this size.

A I told you, I don't know what the Alabama Department of Insurance looks at when they decide whether or not a receivership is appropriate.

Q Have you considered that as a possibility in dealing with these clients?

[p. 248] A Oh, yeah.

Q Have you advised them of that?

A I have not given any advice to these clients. I told you that.

Q To your knowledge has Mr. Sims or anyone in your firm advised there is a possibility of someone else



putting the company in receivership before they ever got to bat?

A I have no knowledge one way or the other about that.

Q You mentioned awhile ago that you disagreed with the amounts that Mr. Moyse had allocated to the settlement package. Has your firm made a similar evaluation either by actuary or somebody else?

A I haven't dealt with the actuary.

Q I'm asking what your firm has done.

A I don't know.

Q In dealing with all the other objectors' lawyers has anyone told you -

A (Interposing) I have not.

Q - what the value of the package is?

A I have not involved myself with that. I mean, I thought you wanted an expert to come up here from the lawyer's side and just talk about why we thought the punitive damages pot was inadequate and what could be done [p. 249] to resolve that.

Q I'm talking about the fairness of the settlement. All of it goes to the fairness of it.

What I want you to tell me, and especially the court, not me, if you think it is unfair, I want you to tell the court why.

A Well, let me just check off things, and don't ask me to tie it to the actuary.

Q No, just your position.

A If somebody has not had cancer, as I understand the settlement, they will then be given the privilege of doing business with a company that defrauded them in taking continuing future premiums, and little else. Now, you might say there is an injunction against future wrongdoing. I'm not aware that is a valid basis for injunctive relief, that you can get an injunction against future tort. I thought the criminal code of the United States and the State of Alabama stood as everybody's injunction against future wrong. So, I don't assign any value to that.

For somebody who has had cancer, they get a chance to make a claim against a fund, and I don't know if that will come up with ten, twenty, or thirty thousand dollars apiece, but in terms of comparing that with a right to go to a trial before a jury and get what you could, I think that is inadequate. I understand that the scope of [p. 250] the settlement deals with a variety of claims, many of which the class plaintiff does not have the typicality to represent. It also would include a release of Torchmark which isn't even a party to the case, and for those reasons I have got problems with the settlement.

Q Anything else?

A And we have already addressed the inadequacy of the punitive damage award.

Q Anything else?

A That is all I can think of right now.

Q If the Court asked you this question, what would it take to make it a settlement package that you and the

lawyers for the objectors, these two hundred people that you represent, what would it take to make it an acceptable package?

A If I was the judge, what would I do to modify it and say, "Liberty National, you either take it or leave it"?

Q Let me defer that question for a second and ask you this question: Do you have an opinion as to whether or not the court could make a conditional approval of this settlement by saying, "I approve it subject to these conditions," and maybe set out the conditions that you are going to give us?

A Well, obviously, a settlement is consentiently.

[p. 251] Q I understand.

A And, so, the judge can't cram the settlement down.

Q Assume if everybody would accept it.

A If the judge says, "I think 'X', 'Y', 'Z' and 'E' and 'B' have got to be a part of any settlement, and I'm not going to approve it until it is in there, and I'll give both parties twenty days to communicate to me whether or not that is acceptable," that would be I think an appropriate way of dealing with an objection to a settlement of a class action.

Q What all categories of policyholders do you believe ought to be allowed to opt out?

A Each and every one.

Q In other words across the board?

A Right. That is an abstract question there. You asked me is there a way to deal with that problem as we sit here today, and you are getting out of - kind of working at a solution to the problem.

Q That is why I phrased it that way. What group of persons and categories would you say should be allowed to opt out to make this a workable settlement?

A I'm not - I want to make sure when I speak that the court doesn't accept whatever I say as the views of every objectors' lawyers out there. I'm not [p. 252] representing a class of objectors. These are my views.

I think that the notice to the extent that it tells people if they don't do something by a certain time, which is pretty darn clear, and I would think from that it could be deduced that anybody who had not come forward within the deadline or as reasonably extended for late filings or whatever, should be held quite fairly as a waiver of the rights to object to a no opt out settlement. Once you get to that point, then you look at the people who have come in an objected and said, "Your Honor, we want our jury trial." I firmly believe under the laws of the State of Alabama they have a right to a trial by jury, all of the class members. And, I would propose that the pot be enhanced by a punitive damage additional component, and then each of the people who have come in and objected would be viewed as having valid rights to take their case to a trial by jury. If they wanted to come in and take a pro rata share of that pot in exchange for waiving their right to trial by jury, and accepting the settlement, then let them do so. Those who said, "No, I still want to go to trial," would be entitled to their opt out, but it



would be with the understanding that if the court's additional punitive damage component is substantial enough to raise a Green Oil curtain drop, then I would assume that those individual litigants who took their claims back to their [p. 253] various circuits and tried to file them on their own, might find some problems in the cases having little value other than the compensatory value component. And that is my response to what I have heard, and I have seen in your briefs, and I heard Richard Gill testify. And Richard is a good friend, and we have agreed on a lot of things, and we disagree on this one, but there is policy argument being made that the greater good requires that a mandatory class action be conducted so that everybody can be brought in and you don't have the risk of one person winning the lottery.

As I argued in the Supreme Court, one of the great difficulties that even the most outstanding advocates at the plaintiff's bar here, with the punitive damage system we have in Alabama is it is so hit or miss, and one person can get like - since this settlement was negotiated and consummated, the Supreme Court has affirmed \$13 million for the fraud of one single agent in Montgomery. Of course, that is information that y'all didn't have when this settlement was negotiated, and you can't be held to clairvoyance. But, nonetheless, the idea of trying to fix a finite sum is difficult, but once the punitive damage award is adequate then these cases around the State won't be worth that much.

Q Would you agree with me that no attorney can tell his client with absolute certainty as to what the [p. 254] outcome of any particular fraud case would be with any particular jury?

A Absolutely.

Q Let me ask you this.

A Let me interrupt. When I argued in the Supreme Court about the policy propositions, that greater good and all that, that may be an idea whose time has come, but I'm firmly convinced that it must come from a Constitutional Amendment. The rule of procedure cannot be cranked up and jury trial rights shut down in an effort to consummate the greater good.

Q Did you ever take the position in writing that an excessive jury award in punitive damages violates the U.S. Constitution?

A Yes, I have.

Q And at what level do you believe in this case that a punitive damage award will violate the U.S. Constitution?

A Well, I have taken the position, I don't know whether in writing or orally or whatever, that a mechanism that is used in the federal system is a trebling of the actuals plus attorney's fees or you could have a quadruple or five times multiple. And if you look at what the actual damages component of the settlement that is on the table in this case is, as stripping out the \$3 million that is now [p. 255] being considered as punitive damages, you could support an argument that three or four times, \$30 million, would be a reasonable punitive damages award, then you have got to crank back in factors such as net worth and so forth. So, restricting it to the profits



gained I think probably is a more generous rule on punitive damages than the traditional multiples in federal court.

Q And you told us two-thirds of the profits in this case plus the \$10 million of insurance that could be available would be – would meet the Constitution test.

A And, again, there is no real – I mean, it is hard to come up with that. I mean, I have some misgivings about coming in here and second-guessing your efforts. This is not an exact science but just my best feelings.

Q Y'all weren't to [sic] bashful in your briefs about second-guessing. I'm not offended. I would ask you this: What is your fee in this case of your two hundred claims?

A I don't know.

Q What do you think?

A A third maybe?

A A third, I don't know.

Q Mr. Gill testified as to the fee in this case, and I believe he stated in his opinion it was a reasonable fee based on a percentage basis of the total –? Would you agree with that testimony?

A I haven't had a chance or been given the [p. 256] opportunity to study any time records or anything like this. If it is forty million hard dollars that you have recovered and no more, and you are recovering a fee of \$4.5 million, I can't say that is unreasonable.

Q Let me ask you this, and put this hypothetical to you: Assume that Liberty National slipped off this evening and offered your clients one hundred thousand dollars each if they would just settle their cases and go home and forget about the lawsuit, forget about objecting and everything else, and I'm not putting that in their minds, but –

MR. GEWIN: You don't have to worry about that.

Q But, assume they went out to Lakepoint tonight and got drunk and made that offer to you in good faith, after they had time to get back to their senses of some normal range, and you took those offers back to the two hundred clients and said, "Clients, we have an offer that Mr. Gewin on behalf of Liberty National that you have sued has made, he wants to pay each one of you one hundred thousand dollars. Would you take it?" All but one said "Absolutely". What are you going to do about that one?

A Well, –

Q That one says, "I want to go to court and get ten hundred million"?

[p. 257] A I guess we would ask him to get another attorney.

Q You would settle with the rest?

A I suppose so.

Q Okay. You haven't guaranteed any of your clients, I'm sure, any certain amount that they are going to

be awarded by a jury in your county or anywhere else have you?

A No. I already said you cannot make a guarantee of that.

Q Can you think of anything else that you would add to the settlement other than adding additional monies to it that would make this acceptable to the two hundred clients that you represent?

A Not right here.

MR. BEASLEY: That is all. Thank you.

#### CROSS-EXAMINATION

BY MR. GEWIN:

Q Mr. Lyons, have you had occasion to determine actuarially or otherwise what the value is to a person who had the old policy which lapsed and who now has cancer of reinstating that policy without providing evidence of insurability?

A No.

Q That would be a benefit that is available to [p. 258] class members that would not be available if this class is not approved, is it not?

A Well, they could file suit and get actual and punitive damages.

Q Well, assume they lapsed that policy in 1976. They would have a statute problem wouldn't they?

A True.

Q As a matter of fact, one of the settlement features that is made available here is that the restitution that is being offered is being offered without regard to stale claims and statute barred claim, isn't it?

A Well, maybe there should be a subclass of people for whom the statute has run so they could be treated differently.

Q No, sir, I'm sorry. I thought - the question is, aren't you aware that the people whose claims are barred by the statute are still getting full restitution?

A I haven't read it that closely. If you say so -.

Q I say so, and I think that is very important, Mr. Lyons, because we are waiving the statute of limitations on these people for purposes of making full restitution. So, I would say that is a pretty big plus. Wouldn't you agree?

A Well, if the plaintiff is in the category of [p. 259] having a barred claim -?

Q Several members of the class I can assure you are.

A But the main plaintiff is not?

Q No, sir, he is not. But, what about the people he is representing in the class? Would you agree waiving the statute of limitation on a claim that might go back to '86 or '87 would be a valuable thing?

A Well, as long as everybody has a right to opt out that is a great idea.

Q Wouldn't it be a great idea for someone that didn't have a right to opt out if he had a claim that was statute barred to be able to assert that in his case?

A Well, for the greater good, I guess the person who has got a time barred claim would be paid off where he wouldn't if he went to the courthouse at the sacrifice to a trial by jury for the one whose time is not -

MR. GEWIN: (Interposing) I would like to move to strike the nonresponsive part of that.

Q I'm asking you whether or not it would be a real benefit for a person with a time barred claim to be able to come in and make a claim for restitution.

A And I answered it in contrast to the detriment of the other people.

Q I'm just asking you about the benefits to the [p. 260] people that are time barred right now. I understand you want to bring out the rest.

Let me ask you this: What about someone who had a new policy, did the exchange and lapsed that new policy but now wants to have it reinstated that has cancer? That would be a substantial benefit without providing evidence of insurability wouldn't it?

A Assuming he couldn't file his own lawsuit.

Q Yes, sir. Maybe that time barred too?

A Maybe so.

Q All right, sir. You would agree that is a benefit wouldn't you?

A That is benefit if the statute has run.

Q And these are benefits that the class counsel has been able to get for class members, isn't it?

A Some of them are going to benefit more than others. It looks like some of the people that are not legally entitled to anything are getting something.

Q Well, you say they are not legally entitled to anything, that shows that class counsel has been pretty hard-nosed in negotiating benefits for people who had these policies, doesn't it?

A For some, yes, sir.

Q Of course, you have got 394,000 people out there. By the way, you said something like 250 or 270,000, [p. 261] you're not really sure how many people are in this class are you?

A No, I'm not. There are more knowledgeable people, and I don't think the judge is going to need to find out from me the size of the class.

Q Yes, sir, I agree. But, you're talking about how much is needed to punish the company, and that sort of thing, and you haven't made any attempt to determine how many people are in this class for purposes of figuring out, well, if you take \$10 per person or \$1,000 per person, or a \$100,000 per person would that would to do [sic] Liberty have you?

MR. SIMS: We have been enjoined in this case from proceeding in any manner, and we have not been allowed discovery.



MR. GEWIN: Our net worth is a matter of public record, and the number of class members is a matter of public record.

WITNESS: Is the profits a matter of public record?

MR. GEWIN: I believe it is.

Q (Mr. Gewin continuing) Well, let me ask you this? Let's take a claimant who we will call a cap buster - you understand what that means?

A Right.

[p. 262] Q And, let's assume that that person had cancer, and had claims that exceeded the caps by \$200,000 back in 19 - let's say back in 1989, and was aware of that, and claims that that was wrong under the policy, Let's just assume that, have you made any computations about what that person would be entitled to?

A If the statute has run?

Q Yeah.

A Probably nothing.

Q Have you made any computations as to what that person would be entitled to under this settlement?

A They would be entitled to the benefits of the person who has penetrated the caps and given a chance to take part out of the fund.

Q Now, how much would that be?

A I guess it depends on how much they had in medical bills.

Q I'm asking you to assume they had a \$200,000 differential because of the cap busting mechanism, and, of course, you understand that a lot of people came out better under the new policy than the old policy, right?

A I'll take your word for that.

Q Well, you know that to be true don't you? Some didn't but some did.

A Some didn't, some did. I'll take your word for [p. 263] that.

Q All right, sir. Now, let me ask you this: The first thing that person who had a time barred claim would get the \$200,000 difference?

A If you say so. You're more familiar with it than I am.

Q You have read the settlement agreement haven't you?

A Yes.

Q You know that person gets full and complete restitution don't you?

A To the limit of the fund.

Q No, sir, it is not limited to the fund.

A It is more or -

Q (Interposing) Take my word for it, it is unlimited to any fund, full and complete restitution, Mr. Lyons.

A All right.

Q You're not aware of that?

A No.

Q In addition to that, that person gets to participate in the \$3 million fund doesn't he?

A If you say so.

Q Well, I'm asking you do you know?

A No, I don't.

[p. 264] Q Do you realize that in the other fund, the \$3 million, that that is to be determined by the court either, based on the number of people who busted the caps or on the amount of dollars they busted?

A All right.

Q Maybe both, maybe a mixture.

A All right.

Q Well, if that person also - if they had a \$200,000 claim that exceeded the caps and the total amount of claims that we have here, by cap busters, are \$2 million, then that would be ten percent. You would have at least a chance to make ten percent claim against that \$3 million fund wouldn't he?

A If he has a lot of out-of-pocket damages they are going to be reimbursed.

Q No, sir. We have already talked about all the out-of-pocket damages to be reimbursed to the tune of \$200,000. I'm talking about in addition to that he would get, if the court says, "I'll prorate your claim, your claim to the extent you exceeded the caps against all claims that exceed the caps right now," do you how much the cap busters have claimed total?

A No.

Q You don't have any judgment?

A No.

[p. 265] Q You don't know whether it is \$2, \$3 or \$4 million?

A No.

Q I'll ask you to assume it is \$2 million; I'll ask you to assume that the pot over here of \$3 million. If that person has a \$200,000 cap bust, and the court gives him ten percent of that amount, ten percent of the \$3 million would be another \$300,000 wouldn't it?

A Right.

Q That person would then get \$200,000 in restitution plus \$300,000 out of the cap fund. That would be half a million dollars just in that hypothetical, wouldn't it, without hiring a lawyer?

A Right.

Q That would be a pretty good benefit wouldn't it?

A He might would rather have a trial by jury.

Q I'm just asking you, have you done that sort of calculation in talking to your 200 clients?

A I have in my own mind weighed the benefits of that kind of claim as compensated for by the settlement versus the value of that kind of claim with a trial before a jury, and, in my judgment if those are your facts, I think they would probably be better off trying the case to a jury.

[p. 266] Q Let me ask you this: If you were the first one up, right?

A Well, more than the first one up, unless you expect to lose one case to the tune of \$100 million, and if the fraud is as egregious as Mr. Beasley says you might.

Q Then you would be barred from any more?

A Right.

Q And Mr. Beasley asked you a question about the internal conflict between the two hundred people you had, and you acknowledged that there would be a problem, several things that you have to talk to those people about, right?

A Right.

Q As a matter of fact, you also got an external conflict with the other members of the bar who also want to get their cases tried, and tried first, right?

A Well, I have never had an external conflict.

Q Mr. Lyons, I have had a lot of them, but I'm talking about in this case. You would agree there is a certain incentive to get your case in there in a hurry and get it tried because you want to get it in there before that Green Oil curtain drops don't you?

A Absolutely.

Q And that is a real strong motivation in all the people trying to get those cases to trial in Mobile and other places, isn't it?

[p. 267] A That's right.

Q In that regards have you determined how you're going to push those two hundred cases to trial, whether you're going to try your cap busters first or the noncap busters or how are you going to do that?

A We would get our clients together and make a decision on that.

Q You haven't done that already have you?

A If it has be done I don't know. I told you, I have not been involved in dealing with those clients.

Q You haven't got an agreement between the Mobile counsel as to what order those cases are going to go in and who's going to go first, who might hit the jackpot and who might not hit anything, right?

A That's right.

Q Were you familiar with the fact - you're familiar with the fact that the Edith McAllister case, that it tried, right?

A Yes, sir.

Q Are you familiar with the fact that in that case the plaintiffs lawyers asked the jury to punish Liberty National for not only for Edith McAllister but all the other people like Edith McAllister?

A I didn't attend the trial.

Q Have you heard that? Do you know that?

[p. 268] A No.

Q That would be an indication that someone was trying to get all of the punishment in one case, wouldn't it? I'll ask you to assume that.



A Yes, that would be that.

Q Okay. And if a jury determines how much punishment due to be assessed, that would be some indication of what a fact finder or punitive award would be wouldn't it?

A Yes, that is some indication, yes.

Q Now, since you don't know how much in claims have been made, and you have not done your own evaluation of these injunctive relief things like premiums, you don't have a personal opinion as to the total value of this case, do you, in terms of what has been proposed other than what Mr. Moyse testified here?

A Well, wait a minute.

Q That is a long question. I'm sorry, that is a bad question.

A Injunctive relieve is like freezing the premiums and does that distinguish from the injunctive relief, they don't commit further fraud?

Q Yes, I think it is, injunctive relief to freeze premiums. Have you made any calculations as to the value of that?

[p. 269] A No, I haven't.

Q Are you counting that in as part of the punishment that you're assigning against Liberty in this case?

A I would have to know what the profit was.

Q Well, what about the injunction that requires us to retrospectively treat all of these policies as though

there were no caps on them, and to give people benefits going back to the summer of 1993 as though the policies were rewritten, to have no caps. Have you made any analysis of the value to the class and to the detriment of Liberty National to doing that?

A No.

Q Let ask you this: Have you had occasion to read this policy?

A No.

Q You haven't read either the old policy or the new policy?

A No, sir.

MR. GEWIN: I believe that is all.

#### EXAMINATION

#### BY THE COURT:

Q Mr. Lyons, one of your criticisms was there is not enough money -

A Yes, sir.

[p. 270] Q - being paid under the settlement?

A Yes, sir.

Q On the full restitution part, if they had a trial they would be entitled to full restitution under a contract claim, right, the difference?

A The plaintiffs would be entitled to their money damages under the breach of contract or would have a fraud claim too.

Q Yeah, but -

A (Interposing) The actual damages.

Q And then those actual damages could be mental anguish and pain and suffering could be in there?

A It could be included.

Q All right. Would you think it would make a settlement fair if you added some to their full restitution for mental anguish, say, half again what the claim was; have ten thousand dollars difference and half again that, five thousand dollars to the mental anguish? Would that make the settlement more fair?

A Yes, sir. And there are problems of administration of mental anguish because it may vary from case to case, but that is certainly an unaddressed component of the package that is on the table, is the value to people.

Q Which would be compensatory damages as opposed [p. 271] to this \$3 or \$4 million punitive damages?

A Exactly. It is considered compensatory.

Q Okay. But, as I understand it, it is your opinion there is no way that this settlement can be upheld and be fair if there is not a provision to opt out for everybody that's in the class?

A I think the Alabama Constitution insists that be the result, because of the jury trialable nature of the claims that are being released by the settlement.

Q Okay. Leaving the Constitutional issue aside for the moment, do you think there is any way it could be fair to members of the class without an opt out provision?

A Your Honor, you're asking me to assume that when all is said and done, and there is legitimate basis under Alabama law for a no opt out?

Q Yes, sir.

A And then what was your question?

Q Could this settlement be made fair?

A You would have -

Q (Interposing) By adding money to it?

A Oh, I would think you would have to add money to it to make it fair. Once you have got a court up the line approved no opt out class, and then you come to address how you settle the case, it becomes a question of an issue of money I think to make it a fair enough [p. 272] settlement.

Q And you don't think that there could be an opt, out on those that the cap busters and a not opt out on those that did not have a claims account?

A That has an appealing sort of practical ring to it, but conceptually in my judgment the Alabama law is so clear that a person in this setting even who has not made a claim has got a right to actual damages and mental anguish, that you couldn't disregard that individual's right to trial by jury which would be the effect of a mandatory class action.

Q So, then, what you are saying is in your opinion there is no way it could be a fair settlement unless there is an opt out provision -

A (Interposing) Yes, and the way to make it a practical settlement that could fly is to require enough to be put into it for punitive damages so it would discourage the opt outs from ever going to court, because theoretically a trial judge who has already seen a punitive damage award rendered for the prior wrong in my judgment would be on sound grounds to grant a partial summary judgment on punitive damages.

Q Damages unless the court ordered compensatory?

A And that would have a chilling effect on the onslaught of litigation that has been talked about.

[p. 273] THE COURT: Thank you.

WITNESS: Judge, may I be excused?

THE COURT: Anything else?

(THEREUPON, the witness was excused from the stand.)

MR. OLEN: I want to make it clear on the record that Mr. Lyons indicated in testimony that he doesn't speak for all the objectors. We certainly don't want to be bound by his testimony as being the limits of all the objectors. We all stand by all the objectors -

THE COURT: (Interposing) That will be fine for on the record. If you want to get up here on the stand they may want to ask you some questions.

MR. OLEN: I just want to make that clear.

THE COURT: I think you made it clear in his testimony that he didn't speak for anybody but himself.

MR. OLEN: I want to make it clear that we reserve all of our objections and don't stand just on -

THE COURT: (Interposing) That will be fine.

EDWARD PATRICK McGUIRE

the witness herein, after first having been duly sworn,  
was

\* \* \*

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**LIBERTY NATIONAL LIFE INSURANCE COMPANY**  
**Cancer Policy**

<b>Insured</b>	<b>Premium and Frequency Chosen by You 1982 Series</b>	<b>7022 Plan</b>
<b>Policy Number</b>	<b>Age and Sex</b>	<b>Agency</b>
<b>Month Day Year Effective Date</b>	<b>Alternate Premium</b>	<b>District</b>

**Insuring Clause**

We insure you against losses due to hospital confinement and other specified expenses resulting from treatment for cancer of you or your dependent child. Such cancer must be first manifested thirty or more days after the effective date of this policy. Cancerous moles or skin lesions must be first manifested ninety or more days after the effective date. Cancer is manifested when symptoms exist which would cause an ordinarily prudent person to seek diagnosis, care, or treatment. Your coverage begins on the effective date of this policy shown in the schedule above and continues while this policy is in force.

**Right to Examine Policy**

Please examine your policy carefully. Within 10 days after this policy is first received, it may be returned to us or to the agent through whom it was purchased. If returned, the policy will be as though it had never been issued. Any premiums paid will be returned.

**Guaranteed Renewable; Premiums Subject to Change**

Your policy is guaranteed renewable for life. You may renew this contract by paying each renewal premium as it falls due or during the grace period. We cannot cancel or refuse to renew your policy. We reserve the right to change premium rates. A change in the rates will apply to all policies of this form issued by us and in force in the state where you live. If we change the rates, your premium will be determined by your age on the effective date of this policy; your sex; and the year of issue of this policy. If we change the rates, we will write you before the change at the address shown in our records. We will not restrict or limit your policy in any other way while it is in force.

Signed for Liberty National Life Insurance Company  
as of its effective date.

/s/ William C. Barclift  
Secretary

/s/ John S.P. Samford  
President

**THIS IS A LIMITED POLICY READ IT CAREFULLY**

**Please Read:**

The basis for this policy is the information on the application. Subject to the provision, "Time Limit on Certain Defenses," misstatements or omissions in the application may void the policy or cause an otherwise valid claim to be denied. Advise us immediately if any information on the application is wrong or if any past medical history has been left out.

### **CANCER POLICY**

BENEFITS FOR EXPENSES INCURRED DUE TO HOSPITAL CONFINEMENT AND OTHER SPECIFIED EXPENSES RESULTING FROM TREATMENT FOR CANCER OF THE INSURED OR A DEPENDENT CHILD TO THE EXTENT HEREIN LIMITED AND PROVIDED.

GUARANTEED RENEWABLE FOR LIFE - SUBJECT TO CHANGE IN PREMIUM RATES INITIAL PREMIUMS SHOWN ON PAGE 1 - NONPARTICIPATING

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##### **Application**

(Attached to the Policy)

### **DEFINITIONS**

**We, Our, Us** - Liberty National Life Insurance Company.

**You, Your** - The person named as the insured under this policy.

**Hospital** - An institution which meets all of the following requirements:

1. Operates pursuant to law;
2. Operates mainly for the care and treatment of sick or injured persons as inpatients for a charge;
3. Provides 24-hour nursing service under the supervision of a registered nurse;
4. Is supervised by a staff of licensed physicians; and

5. Has medical, diagnostic and major surgical facilities or has access to such facilities.

The term "hospital" does not include:

1. Convalescent, rest, or nursing facilities;
2. Facilities for the aged, alcoholics and drug addicts; or
3. Any government hospital except for services rendered on an emergency basis where legal liability exists for charges made to the individual.

**Ambulatory Surgical Center** – A facility that meets all of the following requirements:

1. Provides elective surgical care as its primary purpose;
2. Admits and discharges patients within the same working day; and
3. Is not a part of a hospital.

The term "ambulatory surgical center" does not include:

1. A facility whose primary purpose is to provide therapeutic abortions;
2. A office maintained by a physician for the practice of medicine; or
3. An office maintained for the practice of dentistry.

**Cancer** – Leukemia, Hodgkin's disease, or any form of malignant growth positively diagnosed as cancer (malignant neoplasms) by a licensed doctor of medicine or Osteopathy other than yourself. Such diagnosis must be based on a bioptic examination performed by a recognized Pathologist.

**Surgical Procedure** – A procedure listed in the surgical schedule and procedures involving cutting, suturing,

electrocauterization, coagulation, chemosurgery, endoscopic procedures, and reduction of fractures. Two or more procedures performed through the same incision will be considered as one surgical procedure. The amount payable will be equal to the largest of the amounts for the respective procedures.

**Dependent Child** – Your children, legally adopted children, and step-children who:

1. Are named in the application for this policy or are born or acquired after the effective date of this policy;
2. Are less than twenty-one years of age;
3. Are unmarried; and
4. Either live with you or are dependent upon you for over fifty percent of their support.

The coverage for newly born children will consist of coverage for sickness due to cancer including the necessary care or treatment of medically diagnosed congenital defects, birth abnormalities, or prematurity if due to cancer.

The insurance on any dependent child will terminate:

1. At the earliest of: the child's marriage; the date the child no longer lives in your home or ceases to be dependent upon you for over fifty percent of his or her support if not living with you; or the child's twenty-first birthday;
2. At the earliest of: the child's marriage; the date the child no longer lives in your home or ceases to be dependent upon you for over fifty percent of his or her support if not living with you; or the child's twenty-fifth birthday. This paragraph will be effective only if the child has been enrolled as a full-time



student in a college or university for 5 or more months each year since age twenty-one. The condition of enrollment will be met if a dependent child was eligible for enrollment but was prevented from enrollment due to injury or sickness. Otherwise, such child's coverage will terminate in accordance with paragraphs 1 or 3; or

3. At the earliest of: the child's marriage; or the date the child no longer lives in your home or ceases to be dependent upon you for over fifty percent of his or her support. This paragraph will be effective only for mentally or physically incapacitated dependent children under the following conditions:
  - a. the policy remains in force;
  - b. the child is not covered under another cancer policy issued by us; and
  - c. due proof of such incapacity and dependency is received by us within thirty-one days of the child's twenty-first birthday.

Otherwise, such child's coverage will terminate in accordance with paragraphs 1 or 2. While the dependent child remains mentally or physically incapacitated, we may require proof of such incapacity and dependency. However, after two years from the child's twenty-first birthday, we will not require such proof more than once a year.

## BENEFITS

The benefits specified below cover expenses incurred in the hospitalization or treatment of cancer. Such expenses will consist of the actual charges by the hospital physician, or other providers subject to the limitations contained herein. No benefits will be paid in excess of the

usual and customary charges made by the provider of services or treatments.

## Hospital Expense

- Covered Services: room and board, operating rooms, anesthetics, surgical dressings, X-ray examinations, laboratory tests, drugs, medicines, oxygen, or other necessary medical services or supplies.
- Maximum payment of \$60.00 per day of confinement.

## Ambulatory Surgical Center Expense

- Covered Services: operating rooms, anesthetics, surgical dressings, X-ray examinations, laboratory tests, drugs, medicines, oxygen, or other necessary medical services or supplies used in any surgical procedure.
- Maximum payment of \$100.00 in any one day.

## Radiation Therapy and Chemotherapy Drugs Expense

- Covered Services: charges by hospital or physician for radiation therapy; chemotherapy drugs; and professional administration, preplanning laboratory tests and diagnostic X-ray related to such therapy.
- Charges Not Covered: charges by the hospital for room and board, use of operating rooms, anesthetics, surgical dressings, oxygen, or other medical services or supplies; charges by the hospital for X-ray examinations, laboratory tests, drugs, or medicines not specifically related to radiation therapy or chemotherapy.
- No maximum limit.

**Attending Physician Expense**

- Charges Not Covered: surgery, postoperative care, radiation and chemotherapy.
- Maximum payment of \$15.00 per day.

**Surgical Expense**

- Covered Services: surgical procedures and postoperative care by the operating surgeon or surgeons.
- Maximum payment for one operation to be the amount shown in the surgical schedule below. The amount payable for a surgical procedure not listed will be determined on a consistent basis with the surgical schedule. The maximum amount payable for any such procedure is \$800.00.

**Anesthetist Expense**

- Charges not covered for anesthesia administered in non-surgical procedures.
- Maximum payment of \$100.00 for each surgical procedure.

**Nursing Expense**

- Benefits for care and attendance by either a graduate registered nurse or a licensed practical nurse.
- Charges not covered for nurses who are members of the patient's family or who customarily live with the patient.
- Maximum benefit of \$30.00 per day.

**Blood Transfusion Expense**

- Covered Services: blood or blood components; expenses incurred for blood donors.
- Charges Not Covered: laboratory tests, supplies, or blood subsequently replaced by donor.
- No maximum limit.

**Prescription Drugs and Medicines Expense**

- Benefits for drugs and medicines, including oxygen, prescribed by a licensed physician and administered outside of a hospital or ambulatory surgical center.
- Charges Not Covered: drugs and administration thereof while confined in a hospital or ambulatory surgical center; administration of drugs and medicines including oxygen.
- No maximum limit.

**Transportation Expense**

- Benefits for any person insured under this policy and one attendant for transportation by commercial aircraft, railroad, bus, or professional ambulance exclusive of air ambulance, to and from any hospital in the continental United States to receive specialized treatment.
- Conditions: transportation by the method chosen must be deemed to be medically necessary by the attending physician.
- Charges Not Covered: transportation when not deemed to be medically necessary by the attending physician charges in excess of the current commercial rate for the mode of transportation used; transportation by charter aircraft or an ambulance.

- Maximum of six trips to and from a hospital in a twelve-month period.

### EXCEPTIONS

This policy does not cover: treatment in a governmental hospital; and treatment or services for which no charge is normally made in the absence of insurance.

### SURGICAL SCHEDULE

Procedure	Maximum Amount
<b>ABDOMEN</b>	
49000 Exploratory laparotomy .....	\$260.00
43620 Total gastrectomy .....	600.00
43630 Partial gastrectomy, without vagotomy .....	435.00
44140 Partial colectomy .....	445.00
44150 Total colectomy, with ileostomy	615.00
45110 Complete proctectomy, combined abdomino-perineal ..	620.00
44320 Colostomy or skin level cecostomy .....	280.00
43110 Esophagectomy .....	690.00
43832 Gastrostomy, permanent .....	380.00
51580 Complete cystectomy with ureterosigmoidostomy .....	800.00
51570 Complete cystectomy .....	600.00
<b>EYE</b>	
65101 Enucleation of eye .....	235.00
<b>BRAIN</b>	
61304 Exploratory craniectomy or bone flap craniotomy .....	800.00
61510 Excision of brain tumor .....	800.00

<b>BREAST</b>	
19200 Radical mastectomy, unilateral ..	440.00
19180 Simple mastectomy, unilateral	295.00
<b>CHEST</b>	
32100 Exploratory thoracotomy with biopsy .....	380.00
32440 Pneumonectomy .....	690.00
<b>EXTERNAL-GENITALIA</b>	
<b>FEMALE</b>	
56635 Radical vulvectomy with inguinal lymphadenectomy ....	600.00
57521 Biopsy of cervix .....	150.00
<b>MALE</b>	
54135 Complete amputation of penis with lymphadenectomy .....	700.00
54530 Radical orchiectomy .....	185.00
<b>GENITO-URINARY TRACT</b>	
50220 Nephrectomy .....	410.00
52232 Cystourethroscopy for 0.5-2.0 cm bladder tumor .....	110.00
52235 Cystourethroscopy for 2.0-5.0 cm bladder tumor .....	235.00
52240 Cystourethroscopy for 5.0 cm and larger bladder tumor .....	350.00
52601 Transurethral resection of prostate .....	385.00
55810 Radical prostatectomy .....	535.00
58150 Total hysterectomy .....	355.00
58210 Total hysterectomy with radical lymphadenectomy .....	710.00
<b>SKIN</b>	
11601 Trunk, arm, leg, 1/4-1/2 inch lesion .....	35.00
11621 Scalp, neck, hand, foot, genitalia, 1/4-1/2 inch lesion ....	45.00



11641	Face, ear, lip, nose, mucous membrane, 1/4-1/2 inch lesion ..	60.00
	<b>THROAT</b>	
31360	Laryngectomy, without radical neck dissection .....	485.00
60240	Total thyroidectomy.....	385.00
60250	Total thyroidectomy with radical neck dissection .....	730.00

## GENERAL PROVISIONS

### Conversion

In the event that coverage with respect to any dependent child terminates in accordance with definition of dependent child, or expires for reasons other than for failure to pay premiums when due, such dependent child will be entitled to have issued to him or her an individual policy of cancer insurance. The converted policy will:

1. Be issued at the attained age of the dependent child;
2. Be issued without evidence of insurability;
3. Be most nearly similar to this policy which is then being issued by the company; and
4. Waive any probationary periods or time limits on certain defenses to the extent they have been fulfilled under this policy.

Written application for such policy and payment of the first premium must be made within thirty-one days after termination of insurance under this policy. The converted policy, if issued, will take effect on the day following termination of coverage under this policy. Any special exclusion applicable to such dependent child under this

policy will also apply to such person under any converted policy.

### Consideration

The application and the payment of the required premiums are the consideration for this policy. The receipt of the first premium is hereby acknowledged.

### Premium Payments

#### *When Payable*

Premiums are payable in advance beginning on the effective date. The schedule on page one shows the amounts and frequency of premium payments.

#### *Where Payable*

Premiums are to be paid to us either at one of our offices or to one of our agents. A receipt for premium payments will be furnished. If premiums are paid on a monthly basis, a premium receipt card may be furnished in lieu of an official premium receipt. Failure of an agent to call for a premium collection when due does not excuse the premium payment. In such event, premiums must be paid at one of our offices.

#### *Frequency Of Payment*

Premiums may be paid annually, semiannually, quarterly or monthly. The frequency of premium payments may be changed with our consent by filing a written request on a form satisfactory to and accepted by us. The change in

the frequency of premiums will then become effective on the next premium due date. The payment of any premium will not continue this policy in force beyond the date when the next premium becomes due.

#### **Entire Contract; Changes**

This policy with the application and attached papers is the entire contract between you and the company. No change in this policy will be effective until approved by an executive officer of the company. This approval must be noted on or attached to this policy. No agent may change this policy or waive any of its provisions.

#### **Age Limits**

The coverage provided by this policy on you will not become effective if, at your correct age, you were over sixty-four years of age on the effective date. In the event your coverage would not have become effective, our liability will be limited to a refund. Such refund must be requested by you and will be equal to all premiums paid for such coverage.

#### **Time Limit On Certain Defenses**

##### *Misstatements In The Application*

After two years from the effective date no misstatements in the application may be used to void the policy or deny any claim for expenses incurred after the two-year period.

#### *Pre-existing Conditions*

No claim for expenses incurred after two years from the effective date will be reduced or denied because a sickness or physical condition not excluded by name or specific description before the date of expenses incurred had existed before the effective date of coverage.

#### **Grace Period**

This policy has a thirty day grace period. This means that if a renewal premium is not paid on or before the due date, it may be paid during the grace period. During the grace period, the policy will stay in force.

#### **Reinstatement**

If the renewal premium is not paid before the grace period ends, the policy will lapse. Later acceptance of the premium by us or by our agent without requiring an application for reinstatement will reinstate the policy. If an application is required, you will be given a conditional receipt for the premium. If the application is approved, the policy will be reinstated as of the approval date. Lacking such approval, the policy will be reinstated on the forty-fifth day after the date of the conditional receipt unless we have previously written you of its disapproval. The reinstated policy will cover only loss that results from cancer that is manifested more than ten days after the date of reinstatement. In all other respects your rights and our rights will remain the same, subject to any provisions noted or attached to the reinstated policy.

### **Notice Of Claim**

Written notice of claim must be given within thirty days after any covered treatment or hospitalization starts, or as soon as reasonably possible. The notice can be given to us at our home office or to one of our agents. Notice should include your name and the policy number.

### **Claim Forms**

When we receive the notice of claim, we will send you forms for filing proof of loss. If these forms are not given to you within fifteen days, you will meet the proof of loss requirements by giving us a written statement of the nature and extent of the loss within the time limit stated in "Proofs of Loss".

### **Proofs Of Loss**

Written proof of loss must be given to us within ninety days after the date of each loss. If it was not reasonably possible to give written proof in the time required, we will not reduce or deny the claim for this reason if the proof is filed as soon as reasonably possible. In any event, the proof required must be given no later than one year from the time specified unless you were legally incapacitated.

### **Time Of Payment Of Claims**

Benefits provided by this policy will be paid as soon as we receive proper written proof of loss.

### **Physical Examination**

We may examine you or your dependent child when reasonably necessary for our consideration of your pending claim. This will be done at our expense.

### **Payment Of Claims**

All benefits will be paid to you, unless you direct otherwise in writing. Any benefits unpaid at your death may be paid, at our option, to your surviving spouse or your estate. If the benefits are payable to your estate or if you cannot execute a valid release, we can pay benefits up to \$1,000 to someone related to you by blood or marriage whom we consider to be entitled to the benefits. We will be discharged to the extent of any such payments made in good faith.

### **Legal Action**

No legal action may be brought to recover on this policy within sixty days after written proof of loss has been given as required by this policy. No such action may be brought after three years from the time written proof of loss is required to be given.

### **Misstatement Of Age Or Sex**

If your age or sex has been misstated, the benefits will be those the premium paid would have purchased at the correct age and sex. For the purpose of this policy, your age and the age of your dependent children will be the age last birthday on the effective date of the policy. If the coverage to you or your dependent child provided by this



policy at the correct age would not have become effective or would have terminated, then our liability will be limited to a refund. Such refund must be requested by you and will be equal to the portion of the premiums paid for the period not covered by the policy and attributable to you or your dependent child.

#### Coverage Limited To One Policy

If any person covered by this policy is also insured under another cancer policy issued by us, only one policy chosen by you will be effective. We will refund the premiums for the other policy for the period such policy was in force concurrently with the policy chosen.

#### Conformity With State Statutes

Any provision of this policy which, on its effective date, is in conflict with the laws of the state in which you reside on that date, is amended to conform to the minimum requirements of such laws.

#### LIBERTY (LOGO) NATIONAL

#### LIFE INSURANCE COMPANY

2001 Third Avenue South  
Birmingham, Alabama 35233

When you write to us, please use the  
following mailing address:

P.O. Box 2612

Birmingham, Alabama 35202

Cancer Policy - Guaranteed Renewable For Life  
Subject To Change In Premium Rates -  
Non Participating

#### LIBERTY NATIONAL LIFE INSURANCE COMPANY

Insured	Family Cancer Policy	
	Premium and Frequency Chosen by You	7022-3 Plan
Policy Number	Age and Sex	Agency
Month Day Year Effective Date	Alternate Premium	District

#### Insuring Clause

We insure you against losses due to hospital confinement and other specified expenses resulting from treatment for cancer of you or your dependent. Such cancer must be first manifested thirty or more days after the effective date of this policy. Cancerous moles or skin lesions must be first manifested ninety or more days after the effective date. Cancer is manifested when symptoms exist which would cause an ordinarily prudent person to seek diagnosis, care, or treatment. Your coverage begins on the

effective date of this policy shown in the schedule above and continues while this policy is in force.

### **Right to Examine Policy**

Please examine your policy carefully. Within 10 days after this policy is first received, it may be returned to us or to the agent through whom it was purchased. If returned, the policy will be as though it had never been issued. Any premiums paid will be returned.

### **Guaranteed Renewable; Premiums Subject to Change**

Your policy is guaranteed renewable for life. You may renew this contract by paying each renewal premium as it falls due or during the grace period. We cannot cancel or refuse to renew your policy. We reserve the right to change premium rates. A change in the rates will apply to all policies of this form issued by us and in force in the state where you live. If we change the rates, your premium will be determined by your age on the effective date of this policy; your sex; and the year of issue of this policy. If we change the rates, we will write you before the change at the address shown in our records. We will not restrict or limit your policy in any other way while it is in force.

Signed for Liberty National Life Insurance Company  
as of its effective date.

/s/ William C. Barclift  
Secretary

/s/ John S.P. Samford  
President

## **THIS IS A LIMITED POLICY READ IT CAREFULLY**

### **Please Read:**

The basis for this policy is the information on the application. Subject to the provision, "Time Limit on Certain Defenses," misstatements or omissions in the application may void the policy or cause an otherwise valid claim to be denied. Advise us immediately if any information on the application is wrong or if any past medical history has been left out.

### **FAMILY CANCER POLICY**

BENEFITS FOR EXPENSES INCURRED DUE TO  
HOSPITAL CONFINEMENT AND OTHER SPECIFIED  
EXPENSES RESULTING FROM TREATMENT FOR  
CANCER OF THE INSURED OR A DEPENDENT  
TO THE EXTENT HEREIN LIMITED AND PROVIDED.  
GUARANTEED RENEWABLE FOR LIFE - SUBJECT TO  
CHANGE IN PREMIUM RATES INITIAL PREMIUMS  
SHOWN ON PAGE 1 - NONPARTICIPATING

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**Application**

(Attached to the Policy)

**DEFINITIONS**

**We, Our, Us** – Liberty National Life Insurance Company.

**You, Your** – The person named as the insured under this policy.

**Hospital** – An institution which meets all of the following requirements:

1. Operates pursuant to law;
2. Operates mainly for the care and treatment of sick or injured persons as inpatients for a charge;
3. Provides 24-hour nursing service under the supervision of a registered nurse;
4. Is supervised by a staff of licensed physicians; and
5. Has medical, diagnostic and major surgical facilities or has access to such facilities.

The term "hospital" does not include:

1. Convalescent, rest, or nursing facilities;
2. Facilities for the aged, alcoholics and drug addicts; or
3. Any government hospital except for services rendered on an emergency basis where legal liability exists for charges made to the individual.

**Ambulatory Surgical Center** – A facility which meets all of the following requirements:

1. Provides elective surgical care as its primary purpose;
2. Admits and discharges patients within the same working day; and
3. Is not a part of a hospital.

The term "ambulatory surgical center" does not include:

1. A facility whose primary purpose is to provide therapeutic abortions;
2. An office maintained by a physician for the practice of medicine; or
3. An office maintained for the practice of dentistry.



**Cancer** – Leukemia, Hodgkin's disease, or any form of malignant growth positively diagnosed as cancer (malignant neoplasms) by a licensed doctor of medicine or Osteopathy other than yourself. Such diagnosis must be based on a bioptic examination performed by a recognized Pathologist.

**Surgical Procedure** – A procedure listed in the surgical schedule and procedures involving cutting, suturing, electrocauterization, coagulation, chemosurgery, endoscopic procedures, and reduction of fractures. Two or more procedures performed through the same incision will be considered as one surgical procedure. The amount payable will be equal to the largest of the amounts for the respective procedures.

**Dependent** – Your spouse named in the application for this policy, your children, legally adopted children, and step-children who:

1. Are named in the application for this policy or are born or acquired after the effective date of this policy;
2. Are less than twenty-one years of age;
3. Are unmarried; and
4. Either live with you or are dependent upon you for over fifty percent of their support.

The coverage for newly born children will consist of coverage for sickness due to cancer including the necessary care or treatment of medically diagnosed congenital defects, birth abnormalities, or prematurity if due to cancer.

The insurance on any child covered under this policy will terminate:

1. At the earliest of: the child's marriage; the date the child no longer lives in your home or ceases to be dependent upon you for over fifty percent of his or her support if not living with you; or the child's twenty-first birthday;
2. At the earliest of: the child's marriage; the date the child no longer lives in your home or ceases to be dependent upon you for over fifty percent of his or her support if not living with you; or the child's twenty-fifth birthday. This paragraph will be effective only if the child has been enrolled as a full-time student in a college or university for 5 or more months each year since age twenty-one. The condition of enrollment will be met if a dependent child was eligible for enrollment but was prevented from enrollment due to injury or sickness. Otherwise, such child's coverage will terminate in accordance with paragraphs 1 or 3; or
3. At the earliest of: the child's marriage; or the date the child no longer lives in your home or ceases to be dependent upon you for over fifty percent of his or her support. This paragraph will be effective only for mentally or physically incapacitated dependent children under the following conditions:
  - a. the policy remains in force;
  - b. the child is not covered under another cancer policy issued by us; and
  - c. due proof of such incapacity and dependency is received by us within thirty-one days of the child's twenty-first birthday.

Otherwise, such child's coverage will terminate in accordance with paragraphs 1 or 2. While the dependent child remains mentally or physically incapacitated, we may require proof of such incapacity and dependency. However, after two years from the

child's twenty-first birthday, we will not require such proof more than once a year.

Should you and your spouse become divorced, the coverage on your spouse will cease. Upon written request to us, the premiums on this policy will be reduced. Should you then remarry, coverage on your new spouse may be added by providing evidence of his or her insurability satisfactory to us. Additional premiums in accordance with premiums then in effect will be required.

## **BENEFITS**

The benefits specified below cover expenses incurred in the hospitalization or treatment of cancer. Such expenses will consist of the actual charges by the hospital physician, or other providers subject to the limitations contained herein. No benefits will be paid in excess of the usual and customary charges made by the provider of services or treatments.

### **Hospital Expense**

- Covered Services: room and board, operating rooms, anesthetics, surgical dressings, X-ray examinations, laboratory tests, drugs, medicines, oxygen, or other necessary medical services or supplies.
- Maximum payment of \$60.00 per day of confinement.

### **Ambulatory Surgical Center Expense**

- Covered Services: operating rooms, anesthetics, surgical dressings, X-ray examinations, laboratory tests,

drugs, medicines, oxygen, or other necessary medical services or supplies used in any surgical procedure.

- Maximum payment of \$100.00 in any one day.

### **Radiation Therapy and Chemotherapy Drugs Expense**

- Covered Services: charges by hospital or physician for radiation therapy; chemotherapy drugs; and professional administration, preplanning laboratory tests and diagnostic X-ray related to such therapy.
- Charges Not Covered: charges by the hospital for room and board, use of operating rooms, anesthetics, surgical dressings, oxygen, or other medical services or supplies; charges by the hospital for X-ray examinations, laboratory tests, drugs, or medicines not specifically related to radiation therapy or chemotherapy.
- No maximum limit.

### **Attending Physician Expense**

- Charges Not Covered: surgery, postoperative care, radiation and chemotherapy.
- Maximum payment of \$15.00 per day.

### **Surgical Expense**

- Covered Services: surgical procedures and postoperative care by the operating surgeon or surgeons.
- Maximum payment for one operation to be the amount shown in the surgical schedule below. The amount payable for a surgical procedure not listed will be determined on a consistent basis with the surgical schedule. The maximum amount payable for any such procedure is \$800.00.

**Anesthetist Expense**

- Charges not covered for anesthesia administered in non-surgical procedures.
- Maximum payment of \$100.00 for each surgical procedure.

**Nursing Expense**

- Benefits for care and attendance by either a graduate registered nurse or a licensed practical nurse.
- Charges not covered for nurses who are members of the patient's family or who customarily live with the patient.
- Maximum benefit of \$30.00 per day.

**Blood Transfusion Expense**

- Covered Services: blood or blood components; expenses incurred for blood donors.
- Charges Not Covered: laboratory tests, supplies, or blood subsequently replaced by donor.
- No maximum limit.

**Prescription Drugs and Medicines Expense**

- Benefits for drugs and medicines, including oxygen, prescribed by a licensed physician and administered outside of a hospital or ambulatory surgical center.
- Charges Not Covered: drugs and administration thereof while confined in a hospital or ambulatory surgical center; administration of drugs and medicines including oxygen.
- No maximum limit.

**Transportation Expense**

- Benefits for any person insured under this policy and one attendant for transportation by commercial aircraft, railroad, bus, or professional ambulance exclusive of air ambulance, to and from any hospital in the continental United States to receive specialized treatment.
- Conditions: transportation by the method chosen must be deemed to be medically necessary by the attending physician.
- Charges Not Covered: transportation when not deemed to be medically necessary by the attending physician; charges in excess of the current commercial rate for the mode of transportation used; transportation by charter aircraft or air ambulance.
- Maximum of six trips to and from a hospital in a twelve-month period.

**EXCEPTIONS**

This policy does not cover: treatment in a governmental hospital; and treatment or services for which no charge is normally made in the absence of insurance.

**SURGICAL SCHEDULE**

Procedure		Maximum Amount
	ABDOMEN	
49000	Exploratory laparotomy .....	\$260.00
43620	Total gastrectomy .....	600.00
43630	Partial gastrectomy, without vagotomy.....	435.00
44140	Partial colectomy .....	445.00



44150	Total colectomy, with ileostomy	615.00
45110	Complete proctectomy, combined abdomino-perineal ..	620.00
44320	Colostomy or skin level cecostomy .....	280.00
43110	Esophagectomy .....	690.00
43832	Gastrostomy, permanent.....	380.00
51580	Complete cystectomy with ureterosigmoidostomy.....	800.00
51570	Complete cystectomy.....	600.00
	<b>EYE</b>	
65101	Enucleation of eye .....	235.00
	<b>BRAIN</b>	
61304	Exploratory craniectomy or bone flap craniotomy .....	800.00
61510	Excision of brain tumor.....	800.00
	<b>BREAST</b>	
19200	Radical mastectomy, unilateral	440.00
19180	Simple mastectomy, unilateral	295.00
	<b>CHEST</b>	
32100	Exploratory thoracotomy with biopsy .....	380.00
32440	Pneumonectomy .....	690.00
	<b>EXTERNAL-GENITALIA</b>	
	<b>FEMALE</b>	
56635	Radical vulvectomy with inguinal lymphadenectomy....	600.00
57521	Biopsy of cervix .....	150.00
	<b>MALE</b>	
54135	Complete amputation of penis with lymphadenectomy .....	700.00
54530	Radical orchiectomy.....	185.00

	<b>GENITO-URINARY TRACT</b>	
50220	Nephrectomy .....	410.00
52232	Cystourethroscopy for 0.5-2.0 cm bladder tumor .....	110.00
52235	Cystourethroscopy for 2.0-5.0 cm bladder tumor .....	235.00
52240	Cystourethroscopy for 5.0 cm and larger bladder tumor .....	350.00
52601	Transurethral resection of prostate.....	385.00
55810	Radical prostatectomy.....	535.00
58150	Total hysterectomy.....	355.00
58210	Total hysterectomy with radical lymphadenectomy.....	710.00
	<b>SKIN</b>	
11601	Trunk, arm, leg, 1/4-1/2 inch lesion.....	35.00
11621	Scalp, neck, hand, foot, genitalia, 1/4-1/2 inch lesion ....	45.00
11641	Face, ear, lip, nose, mucous membrane, 1/4-1/2 inch lesion ..	60.00
	<b>THROAT</b>	
31360	Laryngectomy, without radical neck dissection .....	485.00
60240	Total thyroidectomy.....	385.00
60250	Total thyroidectomy with radical neck dissection .....	730.00

## GENERAL PROVISIONS

### Privilege of Exchange

If either you or your spouse should die while this policy is in force, the survivor may exchange it for an individual policy with similar benefits. Written application for the exchange must be made within 30 days from the date of

death of you or your spouse. The premium for the individual policy will be determined by: the age of the continuing insured on the effective date of this policy; the sex of the continuing insured; and the premium rates in use at the time of the exchange for individual policies issued in exchange for this policy. The individual policy will provide coverage for any dependents as defined by this policy as long as they continue to meet the definition of a dependent.

### **Conversion**

In the event that coverage with respect to any dependent terminates in accordance with definition of dependent, or expires for reasons other than for failure to pay premiums when due, such dependent will be entitled to have issued to him or her an individual policy of cancer insurance. The converted policy will:

1. Be issued at the attained age of the dependent;
2. Be issued without evidence of insurability;
3. Be most nearly similar to this policy which is then being issued by the company; and
4. Waive any probationary periods or time limits on certain defenses to the extent they have been fulfilled under this policy.

Written application for such policy and payment of the first premium must be made within thirty-one days after termination of insurance under this policy. The converted policy, if issued, will take effect on the day following termination of coverage under this policy. Any special exclusion applicable to such dependent under this policy

will also apply to such person under any converted policy.

### **Consideration**

The application and the payment of the required premiums are the consideration for this policy. The receipt of the first premium is hereby acknowledged.

### **Premium Payments**

#### *When Payable*

Premiums are payable in advance beginning on the effective date. The schedule on page one shows the amounts and frequency of premium payments.

#### *Where Payable*

Premiums are to be paid to us either at one of our offices or to one of our agents. A receipt for premium payments will be furnished. If premiums are paid on a monthly basis, a premium receipt card may be furnished in lieu of an official premium receipt. Failure of an agent to call for a premium collection when due does not excuse the premium payment. In such event, premiums must be paid at one of our offices.

#### *Frequency Of Payment*

Premiums may be paid annually, semiannually, quarterly or monthly. The frequency of premium payments may be changed with our consent by filing a written request on a form satisfactory to and accepted by us. The change in

the frequency of premiums will then become effective on the next premium due date. The payment of any premium will not continue this policy in force beyond the date when the next premium becomes due.

#### **Entire Contract; Changes**

This policy with the application and attached papers is the entire contract between you and the company. No change in this policy will be effective until approved by an executive officer of the company. This approval must be noted on or attached to this policy. No agent may change this policy or waive any of its provisions.

#### **Age Limits**

The coverage provided by this policy on you will not become effective if, at your correct age, you were over sixty-four years of age on the effective date. In the event your coverage would not have become effective, our liability will be limited to a refund. Such refund must be requested by you and will be equal to all premiums paid for such coverage.

#### **Time Limit On Certain Defenses**

##### *Misstatements In The Application*

After two years from the effective date no misstatements in the application may be used to void the policy or deny any claim for expenses incurred after the two-year period.

#### *Pre-existing Conditions*

No claim for expenses incurred after two years from the effective date will be reduced or denied because a sickness or physical condition not excluded by name or specific description before the date of expenses incurred had existed before the effective date of coverage.

#### **Grace Period**

This policy has a thirty day grace period. This means that if a renewal premium is not paid on or before the due date, it may be paid during the grace period. During the grace period, the policy will stay in force.

#### **Reinstatement**

If the renewal premium is not paid before the grace period ends, the policy will lapse. Later acceptance of the premium by us or by our agent without requiring an application for reinstatement will reinstate the policy. If an application is required, you will be given a conditional receipt for the premium. If the application is approved, the policy will be reinstated as of the approval date. Lacking such approval, the policy will be reinstated on the forty-fifth day after the date of the conditional receipt unless we have previously written you of its disapproval. The reinstated policy will cover only loss that results from cancer that is manifested more than ten days after the date of reinstatement. In all other respects your rights and our rights will remain the same, subject to any provisions noted or attached to the reinstated policy.



### **Notice Of Claim**

Written notice of claim must be given within thirty days after any covered treatment or hospitalization starts, or as soon as reasonably possible. The notice can be given to us at our home office or to one of our agents. Notice should include your name and the policy number.

### **Claim Forms**

When we receive the notice of claim, we will send you forms for filing proof of loss. If these forms are not given to you within fifteen days, you will meet the proof of loss requirements by giving us a written statement of the nature and extent of the loss within the time limit stated in "Proofs of Loss".

### **Proofs Of Loss**

Written proof of loss must be given to us within ninety days after the date of each loss. If it was not reasonably possible to give written proof in the time required, we will not reduce or deny the claim for this reason if the proof is filed as soon as reasonably possible. In any event, the proof required must be given no later than one year from the time specified unless you were legally incapacitated.

### **Time Of Payment Of Claims**

Benefits provided by this policy will be paid as soon as we receive proper written proof of loss.

### **Physical Examination**

We may examine you or your dependent(s) when reasonably necessary for our consideration of your pending claim. This will be done at our expense.

### **Payment Of Claims**

All benefits will be paid to you, unless you direct otherwise in writing. Any benefits unpaid at your death may be paid, at our option, to your surviving spouse or your estate. If the benefits are payable to your estate or if you cannot execute a valid release, we can pay benefits up to \$1,000 to someone related to you by blood or marriage whom we consider to be entitled to the benefits. We will be discharged to the extent of any such payments made in good faith.

### **Legal Action**

No legal action may be brought to recover on this policy within sixty days after written proof of loss has been given as required by this policy. No such action may be brought after three years from the time written proof of loss is required to be given.

### **Misstatement Of Age Or Sex**

If your age or sex has been misstated, the benefits will be those the premium paid would have purchased at the correct age and sex. For the purpose of this policy, your age and the age of each dependent will be the age last birthday on the effective date of the policy. If the coverage to you or your dependent(s) provided by this policy

at the correct age would not have become effective or would have terminated, then our liability will be limited to a refund. Such refund must be requested by you and will be equal to the portion of the premiums paid for the period not covered by the policy and attributable to you or your dependent.

#### **Coverage Limited To One Policy**

If any person covered by this policy is also insured under another cancer policy issued by us, only one policy chosen by you will be effective. We will refund the premiums for the other policy for the period such policy was in force concurrently with the policy chosen.

#### **Conformity With State Statutes**

Any provision of this policy which, on its effective date, is in conflict with the laws of the state in which you reside on that date, is amended to conform to the minimum requirements of such laws.

#### **LIBERTY NATIONAL**

**LIFE INSURANCE COMPANY**

2001 Third Avenue South

Birmingham, Alabama 35233

**When you write to us, please use the  
following mailing address:**

**P.O. Box 2612**

**Birmingham, Alabama 35202**

**Family Cancer Policy -**

**Guaranteed Renewable For Life**

**Subject To Change In Premium Rates -**

**Non Participating**

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1986 Series  
CANCER POLICY

Insured	Premium	Plan
Policy Number	Month Day Year	Age and Sex
	Effective Date	
Agency	District	

### Insuring Clause

We will insure you against losses due to hospital confinement and other specified expenses resulting from treatment for cancer of you. Such cancer must be first manifested thirty or more days after the effective date of this policy. Cancer is manifested when symptoms exist which would cause an ordinarily prudent person to seek diagnosis, care, or treatment. Your coverage continues while this policy is in force.

### Right to Examine Policy

Please examine your policy carefully. Within 10 days after this policy is first received, it may be returned to us or to the agent through whom it was purchased. If returned during this period, the policy will be as though it had never been issued. Any premiums paid will be returned.

### Guaranteed Renewable; Premiums Subject to Change

Your policy is guaranteed renewable for life. You may renew this contract by paying each renewal premium as it falls due or during the grace period. We cannot cancel or refuse to renew your policy. We reserve the right to change premium rates. A change in the rates will apply to all policies of this form issued by us and in force in the

state where you live. If we change the rates, your premium will be determined by your age on the effective date of this policy and the year of issue of this policy. If we change the rates, we will write you 31 days or more before the change at the address shown in our records. We will not restrict or limit your policy in any other way while it is in force.

Signed for Liberty National Life Insurance Company  
as of its effective date.

/s/ William C. Barclift  
Secretary

/s/ John S.P. Samford  
President

### Please Read:

The basis for this policy is the information on the application. Incorrect information in the application could void the policy or cause an otherwise valid claim to be denied. Advise us immediately if any information on the application is wrong or if any past medical history has been left out. No agent may change this policy or waive any of its provisions.

### Cancer Policy

Benefits for loss due to hospital confinement and for other specified expenses resulting from treatment for cancer of the insured to the extent herein limited and provided.



Guaranteed Renewable for Life –  
Subject to Change in Premium Rates  
Initial Premiums as Shown on Page 1 –  
Nonparticipating

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## Application

(Attached to the Policy)

## DEFINITIONS

**Ambulatory Surgical Center** – A facility which meets all of the following requirements:

1. Provides elective surgical care as its primary purpose;
2. Admits and discharges patients within the same working day; and
3. Is not part of the hospital.

The term "ambulatory surgical center" does not include:

1. A facility whose primary purpose is to provide therapeutic abortions;
2. An office maintained by a physician for the practice of medicine; or
3. An office maintained for the practice of dentistry.

**Cancer** – Leukemia, Hodgkin's disease, or any form of malignant growth positively diagnosed as cancer (malignant neoplasms) by a legally licensed doctor of medicine

certified by the American Board of Pathology or a certified Osteopathic Pathologist other than yourself. Such diagnosis must be based on a bioptic examination.

**Disability and Disabled** – The inability of a covered person to perform the duties of his or her gainful occupation as a result of cancer manifested after the 30 day waiting period. Any subsequent disability shall be regarded as a continuation of a previous disability and shall apply to the lifetime maximum weeks of disability.

**Elimination Period** – A period of 14 days at the beginning of disability for which no benefit is payable. If a covered person returns to his or her gainful occupation during that time and then becomes disabled again, the prior period of disability will count towards the elimination period.

**Hospital – A Hospital:**

1. Is licensed and operates pursuant to law;
2. Operates primarily for the care and treatment of sick or injured persons as inpatients for a charge;
3. Provides 24-hour nursing service under the supervision of a registered nurse;
4. Is supervised by a staff of licensed physicians; and
5. Has medical, diagnostic and major surgical facilities or has access to such facilities.

The term "hospital" does not include:

1. Convalescent, rest, or nursing facilities;
2. Facilities for the aged, alcoholics and drug addicts.

**Hospital Confinement** – Continuous confinement in a hospital for more than 12 hours upon the advice and

recommendation of a physician for treatment of cancer manifested after the waiting period. If less than 30 days separate periods of confinement, the second and subsequent periods will be considered a continuation of the first period.

**Skin Cancer** – Any form of malignant growth positively diagnosed as cancer (malignant neoplasms) which is confined to the epidermis, dermis (corium) and/or subcutaneous tissue. Such diagnosis must be based on a bioptic examination performed by a recognized pathologist.

**Surgical Procedure** – Means any procedure, unless otherwise excluded in this policy, which is listed in the Surgery Section of the latest edition of Current Procedural Terminology, as published by the American Medical Association. Two or more procedures performed through the same incision will be considered as one surgical procedure. The amount payable will be equal to the largest of the amounts for the respective procedures.

**We, Our, Us** – Liberty National Life Insurance Company.

**You, Your** – The person named as the insured under this policy.

## BENEFITS

We will pay benefits as described below for treatment of cancer first manifested as provided in the provision entitled "Insuring Clause". Expenses for the treatment of cancer will consist of the actual charges by a hospital, physician, or other provider subject to the limitations

contained herein. No benefits will be paid in excess of the reasonable and customary charges made by the provider of services or treatments.

#### **First Occurrence Benefit**

- When cancer (except skin cancer) is manifested after the 30-day waiting period and we receive diagnosis of cancer as set out in the definition of cancer on page 4, we will pay you a benefit of \$2,000. This benefit is payable only once during the lifetime of a covered person, and it will only be paid upon the first diagnosis of cancer (except skin cancer). The First Occurrence Benefit is not payable for diagnosis of skin cancer.

#### **Hospital Confinement Benefit**

- Hospitalization for ninety days or less:  
During any continuous period of ninety days or less of hospital confinement for treatment cancer, we will pay a benefit of \$100 per day.
- Hospitalization for more than ninety days:  
During any continuous period of more than ninety days of hospital confinement for treatment of cancer, we will pay a benefit of \$100 per day for the first ninety days. Beginning with the ninety-first day of such continuous hospital confinement, we will pay a benefit of \$250 per day.
- If you are confined in a U.S. Government hospital for the treatment of cancer, the hospital confinement benefit is payable for such confinement.
- No lifetime limit.

#### **Outpatient Surgery Benefit**

- We will pay a benefit of up to \$100 for each day you have a surgical procedure as treatment for cancer as an outpatient in a hospital or ambulatory surgical center. This benefit includes charges by the facility. Physicians' charges will be covered under the Surgical Benefit.
- No lifetime limit.

#### **Radiation and Chemotherapy Benefit**

- We will pay a benefit of up to \$500 for each day you receive radiation or chemotherapy cancer treatments which are administered directly by a doctor or a nurse. This benefit includes charges by the hospital and physician for radiation therapy, cobalt therapy, and chemotherapy. Benefits are payable under this paragraph only for the days in which radioactive or chemical treatments are administered or surgically implanted by a doctor or nurse. The surgical implantation of a device to regulate chemical treatments will be considered as a surgical procedure, and a benefit will be payable under the Surgical Benefit. The charge for such device will be payable subject to the daily maximum of \$500.
- No lifetime limit.

#### **Prescription Chemotherapy Drug Benefit**

- We will pay a benefit of up to \$8,000 in any calendar year for the expense of prescription antineoplastic drugs. Benefits are not payable for the mere routine ingestion of chemotherapy as may be directed in a prescription



regardless of where the oral chemotherapy is administered.

- No lifetime limit.

#### **Blood Transfusion Benefit**

- We will pay the amount you are charged for blood or blood components, administration, and processing of blood or plasma when you have a blood transfusion for the treatment of cancer. We will not pay for laboratory tests, supplies, or blood subsequently replaced by donors.
- No lifetime limit.

#### **Transportation Benefit**

- We will pay the amount you are charged for a covered person and one attendant for transportation by commercial aircraft, railroad, bus, or professional ambulance, exclusive of air ambulance, to and from any hospital or clinic in the continental United States to receive specialized treatment for cancer. We will reimburse you fifteen cents per mile if your destination is more than 100 miles away (one-way) and you take your personal car. This Transportation benefit is payable only if you travel to another city on the advice of your physician because similar services are not available in the city where you live. Transportation by the method chosen must be deemed to be medically necessary by the attending physician. Charges in excess of the current commercial rate for the mode of transportation used and transportation by charter aircraft or air ambulance are not covered.

- Maximum of six trips to and from a hospital or clinic in a twelve-month period.

#### **Surgical Benefit**

- We will pay you for surgical procedures for the treatment of cancer by the operating surgeon or surgeons.
- The maximum payment for one operation is the amount shown in the surgical schedule below. The amount payable for a surgical procedure not listed will be determined on a consistent basis with the surgical schedule. The maximum amount payable for any such procedure is \$1,000.
- No lifetime limit.

#### **Anesthetist Benefit**

- We will pay for the administration of anesthesia when a surgical procedure is performed. The maximum payment is 25% of the amount payable for the surgery.
- No lifetime limit.

#### **Attending Physician Benefit**

- We will pay a benefit of up to \$25 per day for charges you receive from your attending physician for the treatment of cancer. This benefit is payable for one physician per day. This benefit is payable whether or not the covered person is confined in a hospital. Charges by the physician for surgery, radiation, and chemotherapy are not covered under this paragraph.
- No lifetime limit.

### Private Duty Nursing Benefit

- We will pay a benefit of up to \$50 for each day for care and attendance in the treatment of cancer by either a graduate registered nurse or a licensed practical nurse recommended by the attending physician. This benefit is payable when services are performed either in a hospital or in the patient's home. This benefit does not cover: general nursing care provided by hospitals, nursing homes, or rehabilitation centers; or nurses who are members of the patient's family or who customarily live with the patient.
- No lifetime limit.

### Prosthesis Benefit

- We will pay a benefit of up to \$500 for a prosthesis used as a result of cancer. Any implantation of a prosthesis is considered a surgical procedure and is not covered under this paragraph.
- Lifetime limit of two devices.

### Hospice Benefit

- We will pay a benefit of up to \$50 per day for charges you receive as a result of: a visit from a representative of a hospice; using the services of a hospital or a U.S. Government hospital on an out-patient basis under the direction of a hospice; or visiting a hospice for treatment or services. This benefit is payable only if the attending physician determines that cancer treatments are no longer of benefit to you, and you are expected to live

six months or less. We will not pay this benefit if you are confined to a hospital or a U.S. Government hospital.

- No lifetime limit.

### Income Replacement Benefit

- We will pay a benefit of \$100 for each week a covered person is disabled as a result of cancer manifested after the 30 day waiting period. Such benefit will begin after an elimination period of 14 days. Benefits will continue for each completed week of disability. Only covered persons who are gainfully employed are eligible for this benefit.
- Benefits cease after a lifetime maximum of 26 completed weeks of disability.

### Dread Disease Benefit

- We will pay the Hospital Confinement Benefit when hospitalized for the treatment of the following specified diseases:

Cystic Fibrosis  
 Diphtheria  
 Encephalitis  
 Lou Gehrig's disease  
 Meningitis  
 Multiple Sclerosis  
 Muscular Dystrophy  
 Osteomyelitis  
 Poliomyelitis  
 Rabies  
 Scarlet Fever  
 Sickle-Cell Anemia  
 Smallpox  
 Tetanus  
 Tuberculosis

Tularemia  
Typhoid Fever

Only the Hospital Confinement Benefit will be payable for the above diseases.

### LIMITATIONS AND EXCLUSIONS

This policy contains a thirty-day waiting period. This means that no benefits are payable to anyone who has cancer or one of the specified dread diseases manifested before the policy has been in force thirty days from the effective date as shown on page one. If you have one of the specified dread diseases manifested before the effective date or during the waiting period, coverage for such specified disease will apply only to expenses incurred after two years from the effective date. If you have cancer manifested during the waiting period, coverage for that cancer will apply only to expenses incurred after two years from the effective date of the policy. If you have cancer manifested during the waiting period, no First Occurrence Benefit will be paid.

If you are confined in a U.S. Government hospital for the treatment of cancer, we will pay the Hospital Confinement Benefit and, if applicable, the First Occurrence Benefit. No benefits are payable under the remaining benefit provisions for such hospital confinement.

If you are confined in a hospital for the treatment of a specified dread disease we will pay the Hospital Confinement Benefit. No benefits are payable under the remaining benefit provisions for such hospital confinement.

This policy does not cover:

1. Treatment for any disease or sickness or incapacity other than cancer or one of the specified dread diseases;
2. Treatment or services covered under any governmental plan (except Medicaid) or for which no charge is normally made in the absence of insurance except for U.S. Government hospitals;
3. Treatment or services outside the continental United States;
4. Treatments which are not accepted or approved by the American Medical Association as an effective treatment for cancer; or
5. Drugs or substances which are not approved by the Federal Drug Administration for use in the treatment of cancer.

### SURGICAL SCHEDULE

Procedure	Maximum Amount
ABDOMEN	
51590 Complete cystectomy, with ureteroileal conduit, including bowel anastomosis. .	\$1000.00
51570 Complete Cystectomy .....	590.00
49000 Exploratory laparotomy .....	260.00
45378 Colonoscopy, fiberoptic, beyond splenic flexure .....	140.00



45110	Complete proctectomy, combined abdomino-perineal .....	620.00
44320	Colostomy or skin level cecostomy .....	280.00
44150	Total colectomy, with ileostomy.....	615.00
44140	Partial colectomy.....	445.00
43832	Gastrostomy, permanent.....	340.00
43630	Partial gastrectomy, without vagotomy....	440.00
43620	Partial gastrectomy.....	600.00
43235	Upper gastrointestinal endoscopy.....	100.00
43110	Esophagectomy.....	760.00

## BONE

20220	Biopsy of bone, trocar, superficial .....	30.00
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## EYE

65101	Enucleation of eye .....	300.00
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## BRAIN

61510	Excision of brain tumor .....	835.00
61304	Exploratory craniectomy or bone flap craniotomy.....	800.00

## BREAST

19200	Radical mastectomy, unilateral.....	420.00
19184	Mastectomy, subcutaneous, unilateral, with immediate prosthetic implant.....	480.00
19180	Simple mastectomy, unilateral .....	280.00
19101	Biopsy of breast, incisional .....	100.00

## CHEST

31620	Bronchoscopy, diagnostic, rigid bronchoscope .....	100.00
31360	Total laryngectomy, without radical neck dissection .....	600.00
32440	Pneumonectomy.....	690.00
32100	Exploratory thoracotomy with biopsy....	400.00

## EXTERNAL-GENITALIA FEMALE

58120	Dilation and curettage.....	100.00
57520	Biopsy of cervix.....	120.00
56630	Radical vulvectomy, without skin graft ...	420.00

## MALE

54530	Complete orchiectomy.....	185.00
54125	Complete amputation of penis.....	340.00

## GENITO-URINARY TRACT

58210	Total hysterectomy with radical lymphadenectomy.....	700.00
58150	Total hysterectomy .....	360.00
55810	Radical prostatectomy .....	525.00
52601	Transurethral resection of prostate .....	385.00
52240	Cystourethroscopy for 5.0 cm. and larger bladder tumor(s).....	340.00
52235	Cystourethroscopy for 2.0-5.0 cm. bladder tumor(s) .....	240.00

52232	Cystourethroscopy for 0.5-2.0 cm. bladder tumor(s) .....	120.00
50220	Nephrectomy, including partial ureterectomy.....	405.00

#### LYMPH NODES

38510	Biopsy or excision of deep cervical node ..	80.00
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#### SKIN

11641	Excision on face, ears, eyelids, nose, lips, 0.5-1.0 cm. lesion.....	50.00
11621	Excision on scalp, neck, hands, feet, genitalia, 0.5-1.0 cm. lesion.....	45.00
11601	Excision on trunk, arms, legs, 0.5-1.0 cm. lesion.....	35.00

#### SPINE AND SPINAL CORD

62270	Spinal puncture, lumbar, diagnostic.....	30.00
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#### THROAT

60252	Thyroidectomy, total or subtotal, with limited neck dissection .....	560.00
60240	Total thyroidectomy .....	390.00

### GENERAL PROVISIONS

#### Consideration

The application and the payment of the required premiums are the consideration for the policy. The receipt of the first premium is hereby acknowledged.

#### Premium Payments

##### When Payable

Premiums are payable in advance beginning on the effective date. The schedule on page one shows the amount of premium for the mode of payment you applied for.

##### Where Payable

Premiums are to be paid to us either at one of our offices or to one of our agents. If premiums are paid on a monthly basis, a premium receipt card may be furnished in lieu of an official premium receipt. Failure of an agent to call for a premium collection when due does not excuse the premium payment. In such event, premiums must be paid at one of our offices.

##### Frequency and Mode of Payment

Premiums may be paid annually, semiannually, quarterly, or monthly. The frequency of premium payments may be changed with our consent by filing a written request on a form satisfactory to and accepted by us. The change will then become effective on the next premium due date. The payment of any premium shall not continue this policy in force beyond the date when the next premium becomes due.

You may have elected to make your premium payment under a special payment mode such as Bank Budget, Government Allotment, Weekly Deduction, Credit Union or Payroll Deduction, if such a mode was available. Payment under one of these modes shall cease if:

- authorization for payment under such mode is terminated or withdrawn; or if
- a check drawn and presented for payment under the Bank Budget mode is not honored.

If payments cease under a special payment mode, you should select a new payment mode. Otherwise we will bill you by premium notice using the payment frequency we select. In either instance the premium shall change from that shown on page one. The new premium shall be what we would have charged had the policy been issued on the new payment mode. It will be due as of the end of the period through which premiums were paid on the special payment mode.

#### **Entire Contract; Changes**

This policy with the application and attached papers is the entire contract between you and the Company. No change in this policy will be effective until approved by an officer of the Company. This approval must be noted on or attached to this policy. No agent may change this policy or waive any of its provisions.

#### **Age Limits**

Coverage provided by this policy on you will not become effective if you were over sixty-four years of age on the effective date. In the event coverage would not have become effective, our liability will be limited to a refund. Such refund must be requested by you and will be equal to all premiums paid for such coverage.

#### **Time Limit On Certain Defenses**

##### **Misstatements In the Application**

After two years from the date of issue, no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period.

No claim for expenses incurred after two years from the effective date will be reduced or denied because a sickness or physical condition not excluded by name or specific description before the date of expenses incurred had existed before the effective date of coverage.

#### **Grace Period**

This policy has a thirty-one day grace period. This means that if a renewal premium is not paid on or before the due date, it may be paid during the grace period. During the grace period, the policy will stay in force.

#### **Reinstatement**

If the renewal premium is not paid before the grace period ends, the policy will lapse. Later acceptance of the premium by us or by our agent without requiring an application for reinstatement will reinstate the policy. If an application is required, you will be given a conditional receipt for the premium. If the application is approved, the policy will be reinstated as of the approval date. Lacking such approval, the policy will be reinstated on



the forty-fifth day after the date of the conditional receipt unless we have previously written you of its disapproval. The reinstated policy will cover only loss resulting from cancer that is manifested more than ten days after the date of reinstatement. In all other respects your rights and our rights will remain the same, subject to any provision noted or attached to the reinstated policy.

#### **Notice of Claim**

Written notice of claim must be given within thirty days after any covered treatment or hospitalization starts, or as soon as reasonably possible. The notice can be given to us at our home office or to one of our agents. Notice should include your name and the policy number.

#### **Claim Forms**

When we receive a notice of claim, we will send you forms for filing proof of loss. If you do not receive these forms within fifteen days, you will meet the proof of loss requirements by giving us a written statement of the nature and extent of the loss within the time limit stated in "Proofs of Loss."

#### **Proofs of Loss**

Written proof of loss must be given to us within ninety days after the date of each loss. If it was not reasonably possible to give written proof in the time required, we will not reduce or deny the claim for this reason if the proof is filed as soon as reasonably possible. However, the proof required must be given no later than one year

from the time specified unless you were legally incapacitated.

#### **Time of Payment of Claims**

Benefits provided by this policy will be paid as soon as we receive proper written proof of loss.

#### **Payment Of Claims**

If you are 18 years of age or older, all benefits will be paid to you unless you direct otherwise in writing. If you are less than 18 years of age, such benefits will be paid to the person having control of this policy. Any benefit unpaid at your death may be paid at our option, to your surviving spouse or your estate. If the benefits are payable to your estate or if you cannot execute a valid release, we can pay benefits up to \$3,000 to someone related to you by blood or marriage whom we consider to be entitled to such benefits. We will be discharged to the extent of any such payments made in good faith.

#### **Physical Examination**

We may examine you when reasonably necessary for our consideration of your pending claim. This will be done at our expense.

#### **Legal Action**

No legal action may be brought to recover on this policy within sixty days after written proof of loss has been given as required by this policy. No such action may be

brought after three years from the time written proof of loss is required to be given.

#### **Misstatement Of Age**

If your age has been misstated the benefits provided by this policy will be those the premium would have purchased at the correct age. For the purpose of this policy, your age will be the age [sic] last birthday on the effective date of coverage. If your correct age is such that this policy would not have become effective or would have terminated, then our liability will be limited to a refund. Such refund must be requested by you and will be equal to the portion of the premiums paid for the period not covered by this policy and attributable to such covered person.

#### **Coverage Limited To One Policy**

If you are also insured under another cancer policy issued by us, only one policy chosen by you will be effective. We will refund the premiums for the other policy for the period such policy was in force concurrently with the policy chosen.

#### **Conformity With State Statutes**

Any provision of this policy which, on its effective date, is in conflict with the laws of the state in which you reside on that date, is amended to conform to the minimum requirements of such laws.

#### **Assignment**

You may assign this policy. However, we will not be bound by any assignment unless it is in writing and acknowledged by us at our home office. We will not be responsible for the validity of any assignment.

**LIBERTY NATIONAL  
LIFE INSURANCE COMPANY  
2001 Third Avenue South  
Birmingham, Alabama 35233**

**When you write to us, please use the  
following mailing address:**

**P.O. Box 2612  
Birmingham, Alabama 35202**

**CANCER POLICY - GUARANTEED  
RENEWABLE FOR LIFE**

**Subject To Change In Premium Rates -  
Nonparticipating**

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**1990 Series  
CANCER POLICY**

Insured	Premium	Plan
HARRIET C HALL	\$16.00 MONTHLY	5GR
31396215	47 F	59
Policy Number	Age and Sex	Agency
08 01 91	\$172.00	013
Month Day Year	Annual	District
Effective Date	Premium	

**Insuring Clause**

We will insure you against losses due to hospital confinement and other specified expenses resulting from treatment for cancer of you. Such cancer must be first manifested thirty or more days after the effective date of this policy. Cancer is manifested when symptoms exist which would cause an ordinarily prudent person to seek diagnosis, care, or treatment. Your coverage continues while this policy is in force.

**Right to Examine Policy**

Please examine your policy carefully. Within 10 days after this policy is first received, it may be returned to us or to the agent through whom it was purchased. If returned during this period, the policy will be as though it had never been issued. Any premiums paid will be returned.

**Guaranteed Renewable; Premiums Subject to Change**

Your policy is guaranteed renewable for life. You may renew this contract by paying each renewal premium as it falls due or during the grace period. We cannot cancel or refuse to renew your policy. We reserve the right to change premium rates. A change in the rates will apply to all policies of this form issued by us and in force in the state where you live. If we change the rates, your premium will be determined by your age on the effective date of this policy and the year of issue of this policy. If we change the rates, we will write you 31 days or more before the change at the address shown in our records. We will not restrict or limit your policy in any other way while it is in force.

Signed for Liberty National Life Insurance Company  
as of its effective date.

/s/ William E. Barclift  
Secretary

/s/ CB Hudson  
President

**Please Read:**

The basis for this policy is the information on the application. Incorrect information in the application could void the policy or cause an otherwise valid claim to be denied. Advise us immediately if any information on the application is wrong or if any past medical history has been left out. No agent may change this policy or waive any of its provisions.



### Cancer Policy

Benefits for loss due to hospital confinement and for other specified expenses resulting from treatment for cancer of the insured to the extent herein limited and provided.

Guaranteed Renewable for Life – Subject to  
Change in Premium Rates  
Initial Premiums as Shown on Page  
1 – Nonparticipating

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### SURGICAL SCHEDULE

Procedure	Maximum Amount
ABDOMEN	
51590 Complete cystectomy, with ureteroileal conduit, including bowel anastomosis..	\$1380.00
51570 Complete Cystectomy .....	.995.00
49000 Exploratory laparotomy .....	.415.00
45378 Colonoscopy, fiberoptic, beyond splenic flexure.....	.205.00
45110 Complete proctectomy, combined abdomino-perineal .....	.940.00
44320 Colostomy or skin level cecostomy .....	.440.00
44150 Total colectomy, with ileostomy.....	.955.00
44140 Partial colectomy.....	.705.00
43832 Gastrostomy, permanent.....	.525.00
43630 Partial gastrectomy, without vagotomy....	.710.00
43620 Partial gastrectomy.....	.890.00
43235 Upper gastrointestinal endoscopy.....	.140.00
43110 Esophagectomy.....	1085.00
BONE	
20220 Biopsy of bone, trocar, superficial .....	.40.00
EYE	
65101 Enucleation of eye .....	.470.00

## BRAIN

61510	Excision of brain tumor .....	1495.00
61520	Craniectomy for excision of brain tumor, with cerebellopontine angle tumor.....	2000.00
61304	Exploratory craniectomy or bone flap cra- niotomy.....	1115.00

## BREAST

19200	Radical mastectomy, unilateral.....	655.00
19182	Mastectomy, subcutaneous, unilateral .....	395.00
19340	With immediate prosthetic implant .....	600.00
19180	Simple mastectomy, unilateral .....	405.00
19101	Biopsy of breast, incisional .....	105.00

## CHEST

31620	Bronchoscopy, diagnostic, rigid broncho- scope .....	140.00
31360	Total laryngectomy, without radical neck dissection .....	1035.00
32440	Pneumonectomy.....	1010.00
32100	Exploratory thoracotomy with biopsy.....	620.00

## EXTERNAL-GENITALIA FEMALE

58120	Dilation and curettage.....	170.00
57520	Biopsy of cervix.....	210.00
56630	Radical vulvectomy, without skin graft ...	825.00

## MALE

54530	Complete orchiectomy.....	295.00
54125	Complete amputation of penis.....	575.00

## GENITO-URINARY TRACT

58210	Total hysterectomy with radical lymphadenectomy.....	1670.00
58150	Total hysterectomy .....	620.00
55810	Radical prostatectomy .....	760.00
52601	Transurethral resection of prostate.....	595.00
52240	Cystourethroscopy for 5.0 cm. and larger bladder tumor(s) .....	495.00
52235	Cystourethroscopy for 2.0-5.0 cm. bladder tumor(s) .....	355.00
52234	Cystourethroscopy for 0.5-2.0 cm. bladder tumor(s) .....	175.00
50220	Nephrectomy, including partial ureterec- tomy.....	650.00

## LYMPH NODES

38510	Biopsy or excision of deep cervical node ...	145.00
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## SKIN

11641	Excision on face, ears, eyelids, nose, lips, 0.5-1.0 cm. lesion.....	65.00
11621	Excision on scalp, neck, hands, feet, geni- talia, 0.5-1.0 cm. lesion.....	55.00
11601	Excision on trunk, arms, legs, 0.5-1.0 cm. lesion.....	45.00

## SPINE AND SPINAL CORD

62270 Spinal puncture, lumbar, diagnostic.....40.00

## THROAT

60252 Thyroidectomy, total or subtotal, with limited neck dissection .....945.00

60254 Thyroidectomy with radical neck dissection..... 1265.00

## DEFINITIONS

**Ambulatory Surgical Center** – A facility which meets all of the following requirements: provides elective surgical care as its primary purpose; admits and discharges patients within the same working day; and is not part of the hospital. The term “ambulatory surgical center” does not include: a facility whose primary purpose is to provide therapeutic abortions; an office maintained by a physician for the practice of medicine; or an office maintained for the practice of dentistry.

**Cancer** – Leukemia, Hodgkin’s disease, or any form of malignant growth positively diagnosed as cancer (malignant neoplasms) by a legally licensed doctor of medicine certified by the American Board of Pathology or a certified Osteopathic Pathologist other than yourself. Such diagnosis must be based on a bioptic examination.

**Disability and Disabled** – The inability of a covered person to perform the duties of his or her gainful occupation as a result of cancer manifested after the 30 day waiting period. Any subsequent disability shall be regarded as a continuation of a previous disability and shall apply to the lifetime maximum weeks of disability.

**Elimination Period** – A period of 14 days at the beginning of disability for which no benefit is payable. If a covered person returns to his or her gainful occupation during that time and then becomes disabled again, the prior period of disability will count towards the elimination period.

**Hospital** – A Hospital: is licensed and operates pursuant to law; operates primarily for the care and treatment of sick or injured persons as inpatients for a charge; provides 24-hour nursing service under the supervision of a registered nurse; is supervised by a staff of licensed physicians; and has medical, diagnostic and major surgical facilities or has access to such facilities. The term “hospital” does not include: convalescent, rest, or nursing facilities; facilities for the aged, alcoholics and drug addicts.

**Hospital Confinement** – Continuous confinement in a hospital for more than 12 hours upon the advice and recommendation of a physician for treatment of cancer manifested after the waiting period. If less than 30 days separate periods of confinement, the second and subsequent periods will be considered a continuation of the first period.

**Skin Cancer** – Any form of malignant growth positively diagnosed as cancer (malignant neoplasms) which is confined to the epidermis, dermis (corium) and/or subcutaneous tissue. Such diagnosis must be based on a bioptic examination performed by a recognized pathologist.

**Surgical Procedure** – Means any procedure, unless otherwise excluded in this policy, which is listed in the Surgery



Section of the latest edition of Current Procedural Terminology, as published by the American Medical Association. Two or more procedures performed through the same incision will be considered as one surgical procedure. The amount payable will be equal to the largest of the amounts for the respective procedures.

**We, Our, Us** – Liberty National Life Insurance Company.

**You, Your Covered Person** – The person named as the insured under this policy.

## BENEFITS

We will pay benefits as described below for treatment of cancer first manifested as provided in the provision entitled "Insuring Clause". Expenses for the treatment of cancer will consist of the actual charges by a hospital, physician, or other provider subject to the limitations contained herein. No benefits will be paid in excess of the reasonable and customary charges made by the provider of services or treatments.

**First Occurrence Benefit.** When cancer (except skin cancer) is manifested after the 30-day waiting period and we receive diagnosis of cancer as set out in the definition of cancer on page 3, we will pay you a benefit of \$2,250. This benefit is payable only once during the lifetime of a covered person, and it will only be paid upon the first diagnosis of cancer (except skin cancer). The First Occurrence Benefit is not payable for diagnosis of skin cancer.

**Hospital Confinement Benefit.** During any continuous period of ninety days or less of hospital confinement for treatment of cancer, we will pay a benefit of \$150 per day.

During any continuous period of more than ninety days of hospital confinement for treatment of cancer, we will pay a benefit of \$150 per day for the first ninety days. Beginning with the ninety-first day of such continuous hospital confinement, we will pay a benefit of \$400 per day. If you are confined in a U.S. Government hospital for the treatment of cancer, the hospital confinement benefit is payable for such confinement. No lifetime limit.

**Outpatient Surgery Benefit.** We will pay a benefit of up to \$150 for each day you have a surgical procedure as treatment for cancer as an outpatient in a hospital or ambulatory surgical center. This benefit includes charges by the facility. Physicians' charges will be covered under the Surgical Benefit. No lifetime limit.

**Radiation and Chemotherapy Benefit.** We will pay a benefit of up to \$500 per day for radiation therapy, chemotherapy drugs and the professional administration thereof. This benefit does not include charges for laboratory tests, diagnostic x-rays or other diagnostic tests related to such treatment. Benefits are payable under this paragraph only for the days in which antineoplastic radioactive or chemical treatments are administered or surgically implanted by a doctor or nurse. The surgical implantation of a device to regulate chemical treatments will be considered as a surgical procedure, and a benefit will be payable under the Surgical Benefit. The charge for such device will be payable subject to the daily maximum of \$500. No lifetime limit.

**Prescription Chemotherapy Drug Benefit.** We will pay a benefit of up to \$10,000 in any calendar year for the

expense of prescription anti-neoplastic drugs. No lifetime limit.

**New or Experimental Treatment Benefit.** We will cover new or experimental treatment for cancer under the regular schedule of benefits, provided the treatment is administered in the continental United States by a licensed physician and you incur a charge for such treatment.

**Blood Transfusion Benefit.** We will pay the amount you are charged for blood or blood components, administration, and processing of blood or plasma when you have a blood transfusion for the treatment of cancer. We will not pay for laboratory tests, supplies, or blood subsequently replaced by donors. No lifetime limit.

**Transportation Benefit.** We will pay the amount you are charged for a covered person and one attendant for transportation by commercial aircraft, railroad, bus, or professional ambulance, exclusive of air ambulance, to and from any hospital or clinic in the continental United States to receive specialized treatment for cancer. We will reimburse you twenty-five cents per mile if your destination is more than 100 miles away (one-way) and you take your personal car. This Transportation Benefit is payable only if you travel to another city on the advice of your physician because similar services are not available in the city where you live. Transportation by the method chosen must be deemed to be medically necessary by the attending physician. Charges in excess of the current commercial rate for the mode of transportation used and transportation by charter aircraft or air ambulance are not covered. Maximum of six trips to and from a hospital or clinic in a twelve-month period.

**Surgical Benefit.** We will pay you for surgical procedures for the treatment of cancer by the operating surgeon or surgeons. The maximum payment for one operation is the amount shown in the surgical schedule on page 2. The amount payable for a surgical procedure not listed will be determined on a consistent basis with the surgical schedule. The maximum amount payable for any such procedure is \$2,000. No lifetime limit.

**Anesthetist Benefit.** We will pay for the administration of anesthesia when a surgical procedure is performed. The maximum payment is 25% of the amount payable for the surgery. No lifetime limit.

**Attending Physician Benefit.** We will pay a benefit of up to \$35 per day for charges you receive from your attending physician for the treatment of cancer. This benefit is payable for one physician per day. This benefit is payable whether or not the covered person is confined in a hospital. Charges by the physician for surgery, radiation, chemotherapy and an office visit for chemotherapy are not covered under this paragraph. No lifetime limit.

**Private Duty Nursing Benefit.** We will pay a benefit of up to \$75 for each day of care and attendance in the treatment of cancer by either a graduate registered nurse or a licensed practical nurse recommended by the attending physician. This benefit is payable when services are performed either in a hospital or in the patient's home. This benefit does not cover: general nursing care provided by hospitals, nursing homes, or rehabilitation centers; or nursing provided by a hospice; or nurses who are members of the patient's family or who customarily live with the patient. No lifetime limit.



**Prosthesis Benefit.** We will pay a benefit of up to \$750 for a prosthesis used as a result of cancer. Any implantation of a prosthesis is considered a surgical procedure and is not covered under this paragraph. Lifetime limit of two devices.

**Hospice Benefit.** We will pay a benefit of up to \$75 per day for charges you receive as a result of: a visit from a representative of a hospice; using the services of a hospital or a U.S. Government hospital on an out-patient basis under the direction of a hospice; or visiting a hospice for treatment or services. This benefit is payable only if the attending physician determines that cancer treatments are no longer of benefit to you, and you are expected to live six months or less. We will not pay this benefit if you are confined to a hospital or a U.S. Government hospital. No lifetime limit.

**Income Replacement Benefit.** We will pay a benefit of \$100 for each week a covered person is disabled as a result of cancer manifested after the 30 day waiting period. Such benefit will begin after an elimination period of 14 days. Benefits will continue for each completed week of disability. Only covered persons who are gainfully employed are eligible for this benefit. Benefits cease after a lifetime maximum of 26 completed weeks of disability.

**Dread Disease Benefit.** We will pay the Hospital Confinement Benefit when hospitalized for the treatment of the following specified diseases:

Cystic Fibrosis  
Diphtheria  
Encephalitis

Rabies  
Scarlet Fever  
Sickle-Cell Anemia

Lou Gehrig's disease  
Meningitis  
Multiple Sclerosis  
Muscular Dystrophy  
Osteomyelitis  
Poliomyelitis

Smallpox  
Tetanus  
Tuberculosis  
Tularemia  
Typhoid Fever

Only the Hospital Confinement Benefit will be payable for the above diseases.

## LIMITATIONS AND EXCLUSIONS

This policy contains a thirty-day waiting period. If you have cancer manifested during the waiting period, coverage for that cancer will apply only to expenses incurred after two years from the effective date of the policy. If you have cancer manifested during the waiting period, no First Occurrence Benefit will be paid. No benefits are payable to anyone who has cancer manifested before the effective date of this policy as shown on page one.

If you have one of the specified dread diseases manifested before the effective date or during the waiting period, coverage for such specified disease will apply only to expenses incurred after two years from the effective date.

If you are confined in a U.S. Government hospital for the treatment of cancer, we will pay the Hospital Confinement Benefit and, if applicable, the First Occurrence Benefit. No benefits are payable under the remaining benefit provisions for such hospital confinement.



If you are confined in a hospital for the treatment of a specified dread disease we will pay the Hospital Confinement Benefit. No benefits are payable under the remaining benefit provisions for such hospital confinement.

This policy does not cover: treatment for any disease or sickness or incapacity other than cancer or one of the specified dread diseases; treatment or services for which no charge is normally made in the absence of insurance except for U. S. Government hospitals, Medicare, Medicaid and Champus; treatment or services outside the continental United States; treatments which are not accepted or approved by the American Medical Association as an effective treatment for cancer; or drugs or substances which are not approved by the Federal Drug Administration for use in the treatment of cancer.

## GENERAL PROVISIONS

**Consideration.** The application and the payment of the required premiums are the consideration for the policy. The receipt of the first premium is hereby acknowledged.

### Premium Payments.

**When Payable.** Premiums are payable in advance beginning on the effective date. The schedule on page one shows the amount of premium for the mode of payment you applied for.

**Where Payable.** Premiums are to be paid to us either at one of our offices or to one of our agents. If premiums are paid on a monthly collection basis, a premium receipt card may be furnished in lieu of an official premium

receipt. Failure of an agent to call for a premium collection when due does not excuse the premium payment. In such event, premiums must be paid at one of our offices.

**Frequency and Mode of Payment.** Premiums may be paid annually, semiannually, quarterly, or monthly. The frequency of premium payments may be changed with our consent by filing a written request on a form satisfactory to and accepted by us. The change will then become effective on the next premium due date. The payment of any premium shall not continue this policy in force beyond the date when the next premium becomes due.

You may have elected to make your premium payment under a special payment mode such as Bank Budget, Government Allotment, Weekly Deduction, Credit Union or Payroll Deduction, if such a mode was available. Payment under one of these modes shall cease if: authorization for payment under such mode is terminated or withdrawn; or if a check drawn and presented for payment under the Bank Budget mode is not honored.

If payments cease under a special payment mode, you should select a new payment mode. Otherwise we will bill you by premium notice using the payment frequency we select. In either instance the premium shall change from that shown on page one. The new premium shall be what we would have charged had the policy been issued on the new payment mode. It will be due as of the end of the period through which premiums were paid on the special payment mode.

**Entire Contract; Changes.** This policy with the application and attached papers is the entire contract between you and the Company. No change in this policy will be

effective until approved by an officer of the Company. This approval must be noted on or attached to this policy. No agent may change this policy or waive any of its provisions.

**Age Limits.** Coverage provided by this policy on you will not become effective if you were over seventy-five years of age on the effective date. In the event coverage would not have become effective, our liability will be limited to a refund. Such refund must be requested by you and will be equal to all premiums paid for such coverage.

#### **Time Limit On Certain Defenses**

**Misstatements In the Application.** After two years from the date of issue, no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period.

**Grace Period.** This policy has a thirty-one day grace period. This means that if a renewal premium is not paid on or before the due date, it may be paid during the grace period. During the grace period, the policy will stay in force.

**Reinstatement.** If the renewal premium is not paid before the grace period ends, the policy will lapse. Later acceptance of the premium by us or by our agent without requiring an application for reinstatement will reinstate the policy. If an application is required, you will be given a conditional receipt for the premium. If the application is

approved, the policy will be reinstated as of the approval date. Lacking such approval, the policy will be reinstated on the forty-fifth day after the date of the conditional receipt unless we have previously written you of its disapproval. The reinstated policy will cover only loss resulting from cancer that is manifested more than ten days after the date of reinstatement. In all other respects your rights and our rights will remain the same, subject to any provision noted or attached to the reinstated policy.

**Notice of Claim.** Written notice of claim must be given within thirty days after any covered treatment or hospitalization starts, or as soon as reasonably possible. The notice can be given to us at our home office or to one of our agents. Notice should include your name and the policy number.

**Claim Forms.** When we receive a notice of claim, we will send you forms for filing proof of loss. If you do not receive these forms within fifteen days, you will meet the proof of loss requirements by giving us a written statement of the nature and extent of the loss within the time limit stated in "Proofs of Loss."

**Proofs of Loss.** Written proof of loss must be given to us within ninety days after the date of each loss. If it was not reasonably possible to give written proof in the time required, we will not reduce or deny the claim for this reason if the proof is filed as soon as reasonably possible. However, the proof required must be given no later than one year from the time specified unless you were legally incapacitated.



**Time of Payment of Claims.** Benefits provided by this policy will be paid as soon as we receive proper written proof of loss.

**Payment of Claims.** If you are 18 years of age or older, all benefits will be paid to you unless you direct otherwise in writing. If you are less than 18 years of age, such benefits will be paid to the person having control of this policy. Any benefit unpaid at your death may be paid at our option, to your surviving spouse or your estate. If the benefits are payable to your estate or if you cannot execute a valid release, we can pay benefits up to \$3,000 to someone related to you by blood or marriage whom we consider to be entitled to such benefits. We will be discharged to the extent of any such payments made in good faith.

**Physical Examination.** We may examine you when reasonably necessary for our consideration of your pending claim. This will be done at our expense.

**Legal Action.** No legal action may be brought to recover on this policy within sixty days after written proof of loss has been given as required by this policy. No such action may be brought after three years from the time written proof of loss is required to be given.

**Misstatement Of Age.** If your age has been misstated the benefits provided by this policy will be those the premium would have purchased at the correct age. For the purpose of this policy, your age will be the age last birthday on the effective date of coverage. If your correct age is such that this policy would not have become effective or would have terminated, then our liability will be limited to a refund. Such refund must be requested by

you and will be equal to the portion of the premiums paid for the period not covered by this policy and attributable to such covered person.

**Coverage Limited To One Policy.** If you are also insured under another cancer policy issued by us, only one policy chosen by you will be effective. We will refund the premiums for the other policy for the period such policy was in force concurrently with the policy chosen.

**Conformity With State Statutes.** Any provision of this policy which, on its effective date, is in conflict with the laws of the state in which you reside on that date, is amended to conform to the minimum requirements of such laws.

**Assignment.** You may assign benefits under this policy. However, we will not be bound by any assignment unless it is in writing and acknowledged by us at our home office. We will not be responsible for the validity of any assignment.

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No. 95-1873

Supreme Court, U. S.

FILED

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CLERK

In The  
**Supreme Court of the United States**

October Term, 1996

GUY E. ADAMS, *et al.*,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

On Writ Of Certiorari  
To The Supreme Court Of Alabama

**BRIEF FOR THE PETITIONERS**

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**QUESTION PRESENTED**

Whether the certification and settlement of this nationwide state court class action, with no right to opt out, violate the Due Process Clause of the Fourteenth Amendment when the claims extinguished by the settlement are predominately, if not exclusively, monetary damages claims.



## LIST OF PARTIES

Petitioners are policyholders of Liberty National Life Insurance Company whose cancer policies were fraudulently exchanged by Liberty National and who objected to the certification and settlement of this class action. Petitioners' respective appeals to the Alabama Supreme Court were decided by the opinion in *Guy E. Adams v. Charlie Frank Robertson*, 676 So. 2d 1265 (Ala. 1995) (Pet. App. 1a-20a). The names of all of the Petitioners are listed in the Appendix to this brief at 9a-22a.

Respondents are Charlie Frank Robertson, the Plaintiff and Class Representative, and Liberty National Life Insurance Company, the Defendant.

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### **OPINIONS BELOW**

The opinion of the Alabama Supreme Court is reported at 676 So. 2d 1265 (Ala. 1995) (Pet. App. 1a-20a). The findings of fact and conclusions of law and the order of the Circuit Court of Barbour County, Alabama, which were affixed as an appendix to the opinion of the Alabama Supreme Court, also are reported at 676 So. 2d 1265, beginning at page 1274. (Pet. App. 21a-92a and 93a-106a, respectively).

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### **JURISDICTION**

The decision of the Alabama Supreme Court was rendered on December 22, 1995, and a timely application for rehearing was denied on February 16, 1996. (Pet. App. 108a). The petition for a writ of certiorari was filed on May 16, 1996, and was granted on October 1, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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### **CONSTITUTIONAL PROVISION AND RULES INVOLVED**

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . " The text of Rule 23 of the Alabama Rules of Civil Procedure and the text of Rule 23 of the Federal Rules of Civil Procedure are set out in the Appendix at pages 1a-4a and 4a-8a, respectively.

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## STATEMENT OF THE CASE

This case presents the question of whether the Due Process Clause is violated by the certification and settlement of a nationwide state court class action with no right to opt out, for the purpose of extinguishing the individual and predominately monetary damages claims of class members. The Alabama Supreme Court, focusing solely upon the injunctive relief purportedly afforded by the settlement and wrongly determining that the relief provided in the settlement was not predominately for money damages, erroneously concluded that due process, as enunciated by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), did not prohibit the certification and settlement, with no opt out, of this class of over 400,000 cancer insurance policyholders of Respondent Liberty National Life Insurance Company ("Liberty National"). (Pet. App. 86a-87a). An examination of the nature of the relief sought in the complaint and the claims foreclosed by this settlement, however, confirms that the class action procedure has been misused in order to thwart the requirement that class members in actions seeking predominately monetary damages be given the opportunity to exclude themselves from the class.

### A. The Underlying Dispute.

This action arose out of a massive "cancer policy exchange program" conducted by Liberty National between 1986 and 1993 to induce owners of existing Liberty National cancer policies to exchange their policies for new cancer policies. The policies sold prior to 1986

included 100% coverage for radiation therapy, chemotherapy, and all drugs and medicines prescribed for use outside the hospital in the treatment of cancer ("old policies"). The new cancer policies contained some additional benefits but (1) limited coverage for radiation and chemotherapy to \$500 per day, (2) limited coverage for prescription chemotherapy drugs, and (3) eliminated any coverage for other out-of-hospital prescription drugs such as pain or anti-nausea medication ("new policies"). *Liberty Nat'l Life Ins. Co. v. McAllister*, 675 So. 2d 1292, 1295 (Ala. 1995) (Pet. App. 137a-39a).

Liberty National instituted the exchange program and developed the new policies to stem a dramatic increase in claims costs that it began incurring on the old cancer policies in the early 1980's as a result of the unlimited radiation, chemotherapy, and prescription drug benefits. (Testimony of John Samford, President of Liberty National from 1982 to 1989, McAllister Transcript ["McA."] 1103-12).<sup>1</sup> The majority of the old policies were guaranteed renewable for life and therefore Liberty National could only alter the unlimited benefits by inducing policyholders to exchange their old policies. (*Id.*).

Liberty National set about to convince policyholders, almost all of whom were debit route customers, to exchange their old policies for the new policies by not disclosing to policyholders that the unlimited benefits, which had been the major selling point of the old policies (Testimony of Robert I. Stewart, President of Liberty

<sup>1</sup> The transcript and trial exhibits from *McAllister* (Pet. App. 136a-151a), are a part of the record in this case but were not separately numbered by the clerk. (Pet. App. 48a).

National from 1976 to 1982, Tr. 340;<sup>2</sup> McA. 583-84), were restricted or eliminated in the new policies. See *McAllister*, 675 So. 2d at 1295 (Pet. App. 139a). In addition to limiting its exposure on the previously unlimited benefits, Liberty National charged higher premiums for the new policies by misrepresenting that they were better policies. (*Id.*). Liberty National further fraudulently increased premiums by shifting policyholders who had purchased policies when they were younger into older age bands.<sup>3</sup> (See, e.g., J.A. 545-46;<sup>4</sup> Tr. 528).

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<sup>2</sup> The designation "Tr. \_\_\_\_" refers to the Reporter's Transcript of the Fairness Hearing.

<sup>3</sup> When health insurance, such as cancer insurance, is purchased, the insured is rated and charged a premium based upon the age band into which the insured falls on the date of the issuance of the policy. Younger insureds pay lower premiums than older insureds for the same coverage. For purposes of premium computation, a policyholder who purchased his or her policy at age 25 will always be charged a premium based upon his or her age on the date of the issuance of the policy, even as to later premium increases. In other words, if the 25 year old policyholder ages ten years, his or her premium, for rating purposes, is still based upon his or her age on the date of the issuance of the policy. When Liberty National exchanged the old cancer policies, Liberty National charged class members, many of whom had owned their cancer insurance policies for years before the exchange, a new premium based upon their age on the date of the exchange, i.e., the date of issuance of the new policy. Accordingly, when the exchange of the cancer policies occurred, the premium paid by many class members on the new policy was higher not only because the new policy was more expensive, but also because they were in an older age bracket at the time of the exchange. (J.A. 545-46).

<sup>4</sup> The designation "J.A. \_\_\_\_" refers to the Joint Appendix.

The nature of the misrepresentations made by Liberty National's agents in order to convince policyholders to exchange their policies varied greatly. Tactics included, for example, using incorrect summaries of the coverage provided by the old policies (Tr. 338-40) and misrepresenting to policyholders that the old policy would lapse if the policyholders did not agree to the exchange (Tr. 657-58). In the course of exchanging the cancer policies, Liberty National agents also implemented other fraudulent schemes to increase commissions, including, for example, exchanging an old family cancer insurance policy for two new individual policies to a husband and a wife and thereby obtaining "double" premiums; switching the named insured from one spouse to the other; and switching policyholders from old policies to "senior" cancer policies which provided approximately half of the benefits provided by the old policies. (See, e.g., R. 2779-805,<sup>5</sup> 3089-90).

By the fall of 1992, Liberty National's fraudulent conduct began to result in lawsuits being filed against Liberty National as policyholders discovered that they had been deceived, often as a result of the filing of a claim against a new policy. (See, e.g., *McAllister*, 675 So. 2d at 1296, Pet. App. 140a). Over 30 individual cases involving the cancer exchange program already were pending against Liberty National at the time this class was certified preliminarily on March 10, 1993. In addition to the cases outside the class which were filed by Class Counsel and are discussed below, two others warrant particular note. In *Boswell v. Liberty Nat'l Life Ins. Co.*, 643 So. 2d 580

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<sup>5</sup> The designation "R. \_\_\_\_" refers to the clerk's record.



(Ala. 1994), the Alabama Supreme Court held that the payment of additional premiums for a new cancer policy by a victim of the cancer exchange program constituted damages sufficient to sustain a claim for compensatory and punitive damages for fraud under Alabama law, even though the policyholder had not had cancer and had not made a claim against the new policy. In *McAllister*, the Alabama Supreme Court affirmed a \$1,001,000 jury verdict in favor of a policyholder whose old policies had been fraudulently exchanged for new policies but who also had not made a claim under her new policies.

#### B. The Class Action.

Class Representative Charlie Frank Robertson ("Class Representative" or "Robertson") initially filed a complaint against Liberty National in the Circuit Court of Barbour County, Alabama, in May 1992, based upon allegedly unauthorized loans on a *life* insurance policy. (J.A. 31-35). On October 2, 1992, Robertson filed an "amendment to complaint" adding claims against Liberty National on behalf of all individuals whose old *cancer* policies had been exchanged for new policies and a motion for an order certifying a class action pursuant to Alabama Rules of Civil Procedure 23(a), 23(b)(2) and 23(b)(3). (J.A. 42-44). The amended complaint sought "*money damages for fraud*," and the motion for certification, which included a request for certification pursuant to Rule 23(b)(3),<sup>6</sup> stated that the action was brought "*for damages*."

<sup>6</sup> This case was certified pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B) of the Alabama Rules of Civil

On October 6, 1992, Class Counsel filed a separate lawsuit in Barbour County on behalf of another victim of the cancer policy exchange program, Louise Peel. (J.A. 45-49). The complaint in Mrs. Peel's separate suit, which was still pending at the time of the fairness hearing in January, 1994 (Tr. 700), also sought only "*compensatory and punitive damages*" for Liberty National's fraudulent conduct in exchanging her cancer policy, not injunctive relief.

At the hearing on the motion for certification on October 16, 1992, Class Counsel stated unequivocally that the relief sought in this action included certification of a Rule (23)(b)(3) class for money damages. (J.A. 62). When the hearing was reconvened on March 8, 1993, Class Counsel, contrary to previous statements made regarding the type of certification sought, requested non opt out certification only pursuant to Rule 23(b)(2), and Liberty National made no factual or legal arguments against class certification. (J.A. 74-75).

On March 10, 1993, the Circuit Judge entered an order preliminarily certifying a non opt out class pursuant to Rule 23(b)(2). The order defined the class as follows:

All past and present insureds under cancer policies issued by Liberty National Life Insurance Company ("Liberty National") providing unlimited coverage for radiation, chemotherapy, and

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Procedure. (App. 1a-4a). Alabama Rule 23 is identical to Rule 23 of the Federal Rules of Civil Procedure (App. 5a-8a) and, accordingly, Petitioners cite to "Rule 23" in lieu of identifying whether the Alabama or Federal rule is referenced unless the context requires otherwise.

out-of-hospital prescription drugs ("old policy"), which coverage was effective on or after August 29, 1986, the date that Liberty National offered new replacement cancer policies limiting coverage for radiation, chemotherapy, and out-of-hospital prescription drugs ("new policy"), *excluding from the certified class any insured, who on or before the date of this class certification order, has filed a separate action against Liberty National asserting claims arising out of the cancer policies on coverage.*

(J.A. 89-91) (emphasis added). The class includes approximately 206,000 policyholders, like Petitioners, whose policies were fraudulently exchanged and 191,000 policyholders who had cancer or whose policies otherwise were not exchanged. (Tr. 495).

The class certification order limited class membership to all insureds who had *not* filed suit on the cancer policies on or before March 10, 1993. This provision was critically important to both Class Counsel and Class Counsel's *individual* clients, who did not want to be limited to the class settlement. In addition to the suit previously filed on behalf of Mrs. Peel, Class Counsel, on the same day the Circuit Judge preliminarily certified the class, filed two lawsuits on behalf of four other plaintiffs in Barbour County against Liberty National based upon the cancer exchange program. (J.A. 79-81, 82-85). These two other lawsuits outside the class, like Mrs. Peel's complaint and the complaint in this action, sought only "*compensatory and punitive damages.*" (*Id.*).<sup>7</sup>

<sup>7</sup> The manipulation of the class definition to permit the exclusion of Class Counsel's own personal clients is even more

On the same day that the Circuit Judge preliminarily certified the class, he also issued an order dismissing Counts One and Two of Robertson's complaint regarding his Liberty National life insurance policy. (J.A. 92). During the fairness hearing, it was confirmed at that time that Robertson had settled those claims on his life insurance policy, which were in no way related to the cancer policy exchange program, for \$150,000. (Tr. 677).

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outrageous in light of the evidence that Class Counsel and Liberty National had settled this class action, at least in principle, *prior* to certification of the class. On November 20, 1992, only a month after the delay of the certification hearing, Liberty National submitted "settlement" policies to the Alabama Department of Insurance. (Tr. 491-92). Liberty National also attempted to have a "no opt out" class certified in regard to the cancer exchange program in separate litigation pending in Mobile County, Alabama, in late 1992 or early 1993. (Brief in Support of Petition for Writ of Mandamus in *Ex parte Eunice W. Long*, No. 1921852, Ex. R at 10-12; Exhibit A to Petitioners' brief on appeal to Alabama Supreme Court).

The Circuit Judge's order of January 29, 1993, setting a hearing for March 8, 1993, on the motion for certification stated that he was setting the motion because it had been "... set once, and continued by the Court due to representations by counsel for Defendant *that this action and other related cases were to be settled. . . .*" (emphasis added). (J.A. 77). An entry on the docket sheet for March 8, 1993 states, "*Class Action settled. Attorneys to prepare order.*" (J.A. 4) (emphasis added).

Such conduct calls into serious question Class Counsel's adequacy of representation and highlights the need for allowing absent class members to control their individual claims. See Susan P. Koniack, *Feasting While the Widow Weeps*, 80 Cornell L. Rev. 1045, 1125 (1995) (courts should prohibit the simultaneous representation of individuals and a class against a common defendant).



### C. The Class Action Settlement.

On June 16, 1993, Liberty National and Class Counsel filed a Stipulation and Agreement of Compromise and Settlement ("Stipulation"). (J.A. 127-65). That document set forth provisions of a proposed settlement which, among other things, did not allow any class members to opt out and required all class members who had not made claims pursuant to their cancer policies to release any pending or future claims for compensatory and punitive damages without any monetary compensation. The settlement provided only for the reformation of new cancer policies so that they would provide the same coverage with respect to radiation, chemotherapy and prescription drugs as was provided under the old policies and for a moratorium on premium increases on the new policies reformed by the settlement until January 1, 1995. In addition, class members who incurred out-of-pocket expenses for claims for radiation, chemotherapy or out-of-hospital prescription drugs which were not covered in whole or in part by the new policies were eligible to obtain reimbursement of the out-of-pocket expenses, to share in an Incidental Monetary Settlement Fund of only \$1 million ("Incidental Fund") and, if they had received less in total benefits under their new policies than they would have received under their old policies, to share in a Supplemental Extra Contractual Monetary Relief Fund of only \$3 million ("Extra Contractual Fund"). The settlement, however, provided for a payment to Class Counsel of up to \$4.5 million in attorney's fees.

The proposed settlement provided no reimbursement of the out-of-pocket losses which the uncontradicted evidence established that class members had suffered as a result of the payment of higher premiums for the new policies. The Class Representative testified that he had suffered out-of-pocket loss from the payment of these higher premiums (Tr. 672), which Class Counsel acknowledged (Tr. 748-49). The extent of the out-of-pocket loss incurred by class members from the payment of additional premiums for the new policies was established through the evidence developed in the *McAllister* case, which was presented to the Circuit Judge here. (J.A. 545-46, McA. 417-27). As noted above, not only were the new policies more expensive, but Liberty National moved policyholders into older age bands for which higher premiums were charged based upon their age at the time of the policy exchange. (J.A. 546).

Even though the settlement provides no relief for the money damages pled in the complaint, significantly, the settlement forecloses class members' claims for monetary damages arising out of the fraudulent exchange of their cancer policies, as well as all other claims for money damages for any other fraud perpetrated in conjunction with the exchange of their cancer policies. Pursuant to the settlement, every class member releases

... Liberty National and each of its past, present, and/or future: parents, subsidiaries, affiliated and related entities and persons, officers, directors, shareholders, agents, successors, and assigns, separately and severally, of and from all claims, causes of action and liabilities (known or unknown) which have been or could be asserted by any Class Member, whether arising under



state or federal statutory or common law, to the extent such claims, causes of action or liabilities arise from, are connected with, or are in any way based upon or related to any allegation of fraud, misrepresentation, concealment, failure to disclose, or other tortious conduct or breach of duty which occurred in whole or in part on or before the date of this Settlement Agreement, regarding (1) the alleged cancer policy exchange programs, (2) any other transaction resulting in the issuance of a new policy providing cancer coverage for a Class Member previously insured under an old policy, or (3) the failure to offer or issue any Class Member a new policy (the "Released Claims").

(J.A. 158-59).<sup>8</sup>

Not only does the release foreclose *all claims* for any fraudulent conduct which occurred in conjunction with the cancer exchange programs or the sale of new cancer policies, but the release broadly discharges any persons

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<sup>8</sup> The terms of the release clearly encompass all claims arising out of the issuance of new cancer policies, including, for example, the forgery of a signature on an application for a new policy. Class Counsel, however, unequivocally testified at the fairness hearing that the settlement of this action was only intended to release claims for damages arising out of the fraudulent exchange of an old cancer policy for a new policy:

My understanding is that [the release] was to be connected with this type of fraud, a switch type, and if it went further than that, certainly, it is not what we agreed to . . . just because it is a cancer fraud, I don't believe it is to be released.

(Tr. 745). The Circuit Judge nonetheless failed to modify the provisions of the release in his final order approving the settlement.

or entities who engaged in such conduct, including Liberty National's parent corporation, Torchmark, and any agents involved in the frauds, even though Liberty National is the only named defendant. The settlement, however, does not provide any benefit, consideration or remedy either for other types of fraud in the sale of cancer insurance policies or for the release of these other entities.

On the same day that the Stipulation was filed, the Circuit Judge entered an order preliminarily approving the settlement in accordance with the Stipulation and reaffirming certification of a non opt out class pursuant to Rule 23(b)(2).<sup>9</sup> The order also set a fairness hearing for October 20, 1993; set forth provisions for notice to absent Class Members; required the filing of objections by absent class members; and enjoined and prohibited all members of the class from prosecuting any action asserting any claims which were proposed to be released pursuant to the settlement. (J.A. 168-80).

Petitioners submitted timely objections to the class certification, class notice, denial of discovery, issuance of injunction and the settlement prior to the October 10, 1993 deadline. (*See, e.g.*, J.A. 190-245). Petitioners' objections included the failure to afford Petitioners the right to opt out of the settlement as required by due process. (*Id.*).

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<sup>9</sup> Beginning on April 30, 1993, numerous Petitioners filed motions for leave to intervene for the purpose of objecting to class certification and requesting exclusion from the class (J.A. 93-106, 107-26) which were pending at the time the Circuit Judge preliminarily approved the settlement without notice to the Petitioners.

Petitioners also submitted a brief in support of the position that the certification of the class pursuant to Rule 23(b)(2) without an opt out was unconstitutional.<sup>10</sup> A fairness hearing pursuant to Rule 23(e) was held in January, 1994.

After the fairness hearing, Liberty National, with Class Counsel's consent, filed a motion for an order certifying the class for settlement purposes pursuant to Rules 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2). (J.A. 386-391). There was *no* indication prior to or during the fairness hearing that class certification pursuant to Rule 23(b)(1)(A) or 23(b)(1)(B) would be considered by the Circuit Judge.

On February 4, 1994, the Circuit Judge issued an order proposing to conditionally approve the settlement (1) certifying the class pursuant to Rules 23(b)(1)(A) and 23(b)(1)(B) in addition to Rule 23(b)(2); (2) increasing the value of the Incidental Fund to \$2,000,000; (3) increasing the value of the Extra Contractual Fund to \$9,000,000; (4) increasing "restitution" to 150%; and (5) extending the premium freeze until the later of January 1, 1996, or one year after the Alabama Supreme Court entered a final order. The Circuit Judge agreed to approve the proposed settlement if these and other minor modifications were accepted by Class Counsel and Liberty National. (J.A. 392-404). Petitioners filed several objections to this order. (J.A. 405-52).

<sup>10</sup> Petitioners' brief was not numbered separately in the record and its filing was recorded in the index to the clerk's record in the "index of miscellaneous boxes," Box #3.

On May 26, 1996 Class Counsel and Liberty National filed a notice accepting the Circuit Judge's modifications to the settlement set forth in the February 4, 1994 order (R.5651-55, 5735-40) and on that same day, the Circuit Judge approved the settlement as modified (Pet. App. 93a, 21a). The Circuit Judge's order certified the class on a non opt out basis pursuant to Rules 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2); required all class members to release any pending and future claims for compensatory and punitive damages; determined that the class notice complied with the requirements of due process and Rule 23; permanently enjoined any class member from participating as a litigant in any action that was part of the "Released Claims" as originally defined in the Settlement; and approved the modified Settlement as being fair to the class. (Pet. App. 93a-106a).

#### D. The Decision of the Alabama Supreme Court.

On December 22, 1995, the Alabama Supreme Court affirmed the Circuit Judge's order and final judgment. The Alabama Supreme Court approved the Circuit Judge's finding that a class could be maintained on a non opt out basis under Rule 23(b)(2) by looking solely at the injunctive relief purportedly provided by the settlement, as opposed to the relief sought in the complaint and the claims released by the settlement, and by affirming, without analysis, the Circuit Judge's finding that Liberty National had acted on grounds generally applicable to the class. The Alabama Supreme Court similarly affirmed the trial court's finding that the class could be maintained



pursuant to Rules 23(b)(1)(A) and (B) without any analysis as to whether this action met the prerequisites of those rules and without regard to the settlement's foreclosure of Petitioners' claims for monetary damages. (Pet. App. 1a-20a).

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### SUMMARY OF ARGUMENT

The Alabama Supreme Court's decision affirming certification and settlement of this nationwide state court class action, without allowing class members a right to opt out, violates the Due Process Clause of the Fourteenth Amendment. Petitioners, all of whom suffered individual monetary damages as a result of the fraudulent exchange of their cancer policies, have been denied the procedural protections required by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and by the balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The claims pled in the complaint and released by the settlement are predominately, if not exclusively, claims for monetary damages. Under *Shutts*, the courts below thus erred in allowing certification of the class on a non opt out basis. Moreover, considering the property interests of class members in their individual claims for monetary damages, the need for additional procedural safeguards to eliminate the erroneous deprivation of those property interests, and the government's interest in efficient resolution of litigation, the certification and settlement of this class, without the right to opt out, does not satisfy due process.

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### ARGUMENT

#### THE CERTIFICATION AND SETTLEMENT OF THIS NATIONWIDE STATE COURT DAMAGES CLASS ACTION, WITH NO RIGHT TO OPT OUT, VIOLATES DUE PROCESS.

- A. This state court class action seeks to "bind known plaintiffs concerning claims wholly or predominately for money judgments" and class members therefore should be allowed to opt out under *Phillips Petroleum Co. v. Shutts*.

The certification and settlement of this nationwide state court class action violates the Due Process Clause of the Fourteenth Amendment because the claims of class members for money damages are extinguished without affording class members an opportunity to opt out. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court held that a state court seeking "to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection." *Shutts*, 472 U.S. at 811-12. Minimal due process protection includes "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel" and "an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 812 (emphasis added).

This class action seeks to bind known plaintiffs, Alabama and nonresidents alike, "concerning claims wholly or predominately for money judgments." Accordingly,



this Court's decision in *Shutts* mandates that the members of this nationwide state court class action be afforded the right to opt out in order to satisfy the requirements of due process.

Each class member whose cancer policy was exchanged suffered out-of-pocket monetary damages based upon the payment of higher premiums for the new cancer policies, which in most cases also includes higher premiums incurred as a result of class members being shifted into older age bands. The payment of these higher premiums alone is sufficient to support a claim for fraud. See *Boswell*, 643 So. 2d at 585; *McAllister*, 675 So. 2d at 1298.

Moreover, class members who had cancer claims, all or part of which would have been paid under an old policy but were not covered under the new policy, suffered additional out-of-pocket monetary damages. Each class member also has a compensatory damages claim for mental anguish and a punitive damages claim. The settlement of this class action was designed to and does foreclose these individual claims for money damages arising out of the fraudulent exchange of class members' cancer insurance policies.

The relief initially sought by the Class Representative in this action and the relief claimed in cases outside the class confirm that the claims of class members are predominately individual claims for money damages. The Class Representative himself denominated this action as one for money damages both in his complaint and in his motion for class certification. At the initial hearing on class certification, Class Counsel stated that the relief

sought included money damages pursuant to Rule 23(b)(3). (J.A. 62). Not until the continuation of the certification hearing on March 8, 1993, when Class Counsel requested for the first time that the case be certified solely pursuant to Rule 23(b)(2), was this action ever characterized as one seeking declaratory and injunctive relief. (J.A. 74-75). Tellingly, the separate lawsuits arising out of the cancer exchange program which were filed by Class Counsel all sought only money damages, not injunctive relief. (J.A. 45-49, 79-81, 82-88). The lawsuits filed by other policyholders prior to certification of the class likewise sought money damages. See, e.g., *Boswell*, 643 So. 2d at 582; *McAllister*, 675 So. 2d at 1294.

Examining the nature of the claims and rights which class members are forced to release pursuant to the settlement further establishes that this action is one wholly or predominately for monetary damages.<sup>11</sup> The broad release imposed by the settlement extinguishes the class members' individual claims at law for money damages. The

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<sup>11</sup> Focusing on the claims or rights class members are required to release in a settlement, rather than the parties' characterization of the remedy, has been utilized previously as a means of determining whether an action is predominately for a money judgment. In *Raskin v. Birmingham Steel Corp.*, Civ. A. No. 11365, 1990 WL 193326 (Del. Ch. Dec. 4, 1990), the court stated:

... in assessing whether a case is one "wholly or predominantly for a money judgment" ... it is necessary to consider not simply the claims asserted in the complaint, but also those that will be barred by res judicata effect of a judgment or, in the context of a settlement, those that are to be released.

*Id.* at 6; see also Herbert B. Newberg & Alba Conte, *Newberg On Class Actions*, § 12.17 (3d ed. 1992).

only equitable or injunctive aspect of this action is the injunctive "remedy" manufactured by Class Counsel and Liberty National. When this action is considered from the perspective of the claims and rights that class members are being forced to give up, there is no doubt that the case is one "wholly or predominately" for money damages.

**B. The Due Process Clause requires that when class members possess claims for money damages which will be extinguished by a class action settlement, they must be afforded the right to opt out with respect to those claims.**

1. *Shutts* establishes that, in order to bind any class member with respect to claims "wholly or predominately" for money damages, due process requires that all absent class members be afforded the right to opt out.

Although *Shutts* was decided in the context of whether a state court could exercise jurisdiction over the claim of an absent class action plaintiff even though the plaintiff might not possess minimum jurisdictional contacts with the forum state, the Court's holding in *Shutts* articulates the minimum due process required to bind any class member with respect to an individual claim for money damages – notice, adequate representation and the right to opt out – not just those class members who lack minimum jurisdictional contacts. This Court's holding in *Shutts* is premised on the Court's recognition that a chose in action is a constitutionally recognized property interest possessed by each class member. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20

(1950), cited in *Shutts*, 472 U.S. at 807. Under that aspect of due process, the existence of a right to opt out does not turn on whether the absent class members live in the forum state or a neighboring state, but rather on the need to allow class members the opportunity to exercise individual control over their own claims.

This Court, in holding in *Shutts* that a state court can only bind an absent plaintiff concerning a claim for money damages or similar relief at law by providing the right to opt out as well as notice and opportunity to be heard, recognized that in class actions involving individual claims for damages, class members are ensured an opportunity to be heard tailored to their individual circumstances only when they are afforded the right to exclude themselves from the class. See *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). Thus, the only reasonable reading of *Shutts* is that, because of the settlement's denial of opt out rights here, neither Petitioners nor any other of the absent class members could be bound by the trial court's order.<sup>12</sup>

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<sup>12</sup> Indeed, the language of this Court's holding in *Shutts* describes the minimum due process protections for all absent class members and gives no indication that absent class members who had minimum contracts with Kansas (the forum state) could have been denied notice and an opportunity to opt out. *Shutts*, 472 U.S. at 812 (citations omitted).

2. Application of the test enunciated by this Court in *Mathews v. Eldridge* demonstrates that due process requires that *all* of the absent class members, whether they reside in Alabama or elsewhere, must be afforded the right to opt out of this nationwide state court class action to pursue their individual money damages claims.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set forth the test for determining "what process is due" before the government may deprive a person of an interest protected by the Due Process Clause. Although *Mathews* arose in the administrative rather than the judicial context at issue here, the constitutional origins of the right, and the analysis required, are identical. See *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 33 (1981) (due process standards are intended to ensure that "judicial proceedings are fundamentally fair") (applying *Mathews v. Eldridge* factors to court proceeding involving termination of parental rights).

Under *Mathews*, three separate factors must be considered to determine the dictates of due process before the government may deprive a person of an interest protected by the Constitution:

... first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional

or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335. Subsequently, in *Connecticut v. Doe*, 501 U.S. 1 (1991), this Court recognized that in a dispute between private parties, the burden of increased procedural protection often falls heaviest on the party who opposes the additional procedure. Thus, while giving due consideration to any interest the government might have in providing additional protection or foregoing the additional burden, this Court in *Doe* also analyzed the private interest of the party who opposed the additional protections. When this case is analyzed in light of these four factors, the mandatory certification and settlement of this class action clearly fail to satisfy due process.

a. *The Private Interests Affected.* The property interests at stake in this case are the individual claims of each class member for money damages against Liberty National, its agents, and the other persons and entities liable for the fraudulent exchange of their cancer policies. All class members whose policies were exchanged have claims based upon the higher premiums charged for the new policies. Many class members have additional claims based upon increased premiums which were paid as a result of being shifted into an older age band. All class members whose policies were exchanged have claims for mental anguish and punitive damages. The value of the compensatory damages claims of class members who did not make claims against their policies alone is substantial as the \$1,000 in compensatory damages awarded in *McAllister* demonstrates. (See *McAllister*, 675 So. 2d at 1294, Pet. App. 136a). Class members who had cancer



claims which were not covered by the new policies but which would have been covered by the old policies have additional, and obviously more significant, monetary claims.

The individual monetary claims extinguished by this settlement deserve due process protection, particularly when compared to other cases involving constitutionally protected property interests. In *Shutts*, for example, this Court held that due process required an opt-out right where the money damage claims of class members equaled approximately \$100 each, which is less than what is at stake here. *Shutts*, 427 U.S. at 801. This Court similarly has given constitutional protection to "property" of relatively small dollar value. See *Parratt v. Taylor*, 451 U.S. 527, 529-30 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (\$23.50 hobby kit at issue).

The elimination of class members' claims for monetary damages thus implicates their right to due process. *Mullane*, 339 U.S. at 311, 313. When the property rights affected are deemed "substantial," this Court has recognized a significant private interest in additional procedural protections. See *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 488-89 (1988) (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983)) (because tax sale had effect of "immediately and drastically diminishing" value of mortgagee's security interest, due process required direct notice of tax sale to mortgagee). In this case, the right to opt out would permit Petitioners to preserve and control their significant individual monetary claims.

b. *Risk of Erroneous Deprivation.* The terms of this settlement exemplify the unfairness which can result by prohibiting class members from removing themselves from a settlement which forecloses their individual claims for money damages. As discussed above, class members who did not make claims against their policies receive no monetary remedy and are afforded solely injunctive relief in the form of a "reformed" insurance policy. The settlement ~~to~~ fails to compensate class members for the increase in premiums Liberty National fraudulently obtained by charging higher premiums for the new policies and by moving class members into higher age bands. Even more troubling, the settlement perpetuates Liberty National's profits from its fraudulent conduct.

The settlement contemplates that, in the event a class member makes a claim against his or her new policy in the future, the claim will be paid as if the new policy contained 100% coverage for radiation, chemotherapy or prescription drugs, but in all other respects will be paid pursuant to the terms of the new policy. Although the settlement provides for a freeze in premiums through the later of January 1, 1996, or one year after a final decision is rendered by the Alabama Supreme Court, after that time Liberty National is free to raise premiums at whatever rate Liberty National desires. (Tr. 684). By requiring class members who have not had cancer to continue to do business with Liberty National in order to obtain any benefit whatsoever from the settlement, the settlement not only preserves Liberty National's business but allows Liberty National to continue collecting the higher premiums it fraudulently obtained by moving class members into higher age bands.

The settlement provides that class members who made claims pursuant to their policies for radiation, chemotherapy, and prescription drugs before June 16, 1993, and who submitted a proof of claim form in this action before January 20, 1994, are entitled to "restitution"<sup>13</sup> and to share in the Incidental Fund. In order to share in the Extra Contractual Fund, class members must, in addition, have received less in total benefits under their new policies than they would have received under the old policies. The settlement, however, in no way accounts for the individual circumstances of such class members, including their mental anguish and other consequential damages.

Based upon the numbers which were introduced by Liberty National at the fairness hearing, as few as 167 class members of the approximately 300,000 class members whose policies were exchanged may be entitled to share in the Extra Contractual Fund (J.A. 617-18) and only 664 class members may be entitled to share in the Incidental Fund (J.A. 614-15). There is no logical explanation for allowing only this limited group of class members to participate in the monetary relief funds, which the trial court found to be in the nature of punitive damages. To the extent that all class members have the right to seek an award of punitive damages, it is grossly unfair to the vast

<sup>13</sup> The settling parties and the trial court have loosely labeled as "restitution" the settlement's provisions paying 150% of the out-of-pocket costs of these class members. Such relief would be more properly characterized as money damages. See *In re School Asbestos Litig.*, 104 F.R.D. 422, 438-39 (E.D. Pa. 1984).

majority of class members to preclude them from participating in the monetary funds, while at the same time denying them the right to seek such damages in individual litigation.

The breadth of the release further highlights the risk of erroneous deprivation by denying class members an opportunity to opt out. As discussed above, the release forecloses any claims for fraudulent or other wrongful conduct which occurred in conjunction with the exchange of a cancer policy and discharges not only Liberty National but all persons or entities who might be liable for such fraudulent conduct.

The erroneous deprivation of class member's property interests which results from denial of a right to opt out also is illustrated by the effect of the mandatory settlement on non residents. Petitioners include residents of Mississippi, Georgia, Tennessee, Kentucky and Louisiana. Rule 23 allowing class actions has never been adopted by Mississippi and class actions are not recognized in Mississippi, yet Mississippi class members find themselves bound by a foreign state court class action with no right to opt out. Georgia prohibits certification of class actions in cases involving oral fraud. See *Stevens v. Thomas*, 361 S.E.2d 800, 804 (Ga. 1987). Georgia class members, however, find themselves bound by a state court class action in Alabama extinguishing their claim for damages arising from oral fraud which occurred in Georgia.

The risk of erroneous deprivation is most dramatically illustrated in this case by Class Counsel's manipulation of the class definition to allow his individual clients



to escape from the class.<sup>14</sup> If the settlement Class Counsel negotiated was not good enough for his own individual clients, due process should not permit him to impose that settlement on unwilling absent class members. When one further considers the failure to provide any monetary relief to the great majority of class members, the \$150,000 paid to the Class Representative on the day the class was certified to settle his life insurance claim and the \$4.5 million attorney's fee paid to Class Counsel, the need for permitting the absent class members to exercise individual control over their own damages claims becomes readily apparent.

Even before *Shutts*, courts often expressed concern about the due process rights of absent plaintiffs being foreclosed by class actions seeking damages. See, e.g., *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983) (certification under (b)(2) limited to injunctive relief to protect opt

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<sup>14</sup> The filing of these individual lawsuits, together with substantial other evidence, demonstrates that the Petitioners were denied adequate representation as required by due process. See *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Such evidence includes the lack of typicality of the claims of the Class Representative from other class members; the \$150,000 paid to the Class Representative to settle his claim based upon fraudulent loans against his life insurance policy (Tr. 677) on the same day the class action was certified; the allocation of the monetary funds provided by the settlement, see *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630-31 (3d Cir.), cert. granted, 65 U.S.L.W. 3159 (U.S. Nov. 1, 1996) (No. 96-270); the evidence that the class action was already settled at the time class certification was sought; and the breadth of the release. This Court need not reach the issue of adequacy, however, if it accords Petitioners the right to opt out.

out with respect to claims for damages). The potential for diverging interests in class actions involving substantial money damages has led some courts to recognize the need to allow absent class members the right to opt out of even purportedly "mandatory" classes. *Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989, 994 (5th Cir. 1981) (permitting class members to opt out of (b)(2) class action was allowed on ground that, when individual monetary relief is sought, the class "begins to resemble a 23(b)(3) action and there has been more concern with protecting the due process rights of the individual class members . . ."). In *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), the Eleventh Circuit Court of Appeals recognized the importance of providing the right to opt out even in an action certified pursuant to Rule 23(b)(2), when class members have unique claims for monetary damages. The Eleventh Circuit stated there:

Because many monetary claims in cases are unique to individual class members, we hold that the right to opt out of the class, normally accorded only to members of classes certified under Rule 23(b)(3), must be extended to all members of this (b)(2) class.

*Id.* at 1152.

In cases properly certified pursuant to (b)(1) and (b)(2) but which nonetheless include claims for monetary relief, courts have found that other safeguards may adequately compensate for the lack of an opt out right. For example, courts have emphasized that, when the interests of such a class are completely unified and there is no possibility of any difference among class members, this



cohesiveness, in addition to adequate representation, provides an appropriate due process protection. See *Califano v. Yamasaki*, 442 U.S. 682 (1979) (class sought equitable relief concerning procedures for recouping Social Security overpayments); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 251 (3d Cir.), cert. denied, 421 U.S. 1011 (1975) ("The cohesive characteristics of the class are the vital core of a (b)(2) action."). But such actions for recoupment of government benefits or for back pay in an employment discrimination suit do not involve the individual issues that characterize fraud claims for unliquidated monetary damages.

In some cases, courts have afforded additional due process protection with respect to individual damages claims by allowing class members an opportunity to assert individual damages claims in the same action. For example, in *King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524, 529 (6th Cir. 1986), the class members received individual notice of both the settlement adjudicating claims arising out of a maternity leave policy and their opportunity to make a personal claim for monetary relief and/or to object to the settlement.

This case, which clearly was not properly certified under either Rule 23(b)(1) or (b)(2),<sup>15</sup> affords none of

<sup>15</sup> The certification of this action pursuant to Rules 23(b)(1)(A) and 23(b)(1)(B) after the fairness hearing without any notice to class members is contrary to the law and unsupported by the facts. The mere fact that some plaintiffs may be successful in lawsuits against a defendant, while others may not, is not a ground for invoking Rule 23(b)(1)(A). See *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984);

these other safeguards. The claims of all class members are dissimilar in substantial respects and are divergent among groups of class members in other respects. The lack of cohesiveness here does not satisfy due process, and Petitioners erroneously have been deprived of their property interests in their individual monetary claims.

c. *The Government's Interest.* Any governmental interest in efficient and expeditious resolution of claims through class actions is outweighed by the government's significant interest in ensuring that the class action procedure does not wrongly deprive the property rights of citizens who have had no opportunity to protect themselves by opting out of the class. Moreover, while public policy generally favors settlements, such a generalized interest in fostering settlements cannot override the government's interest in ensuring that procedures produce equitable results:

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*McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist.*, 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976). Petitioners' claims are predominately for money damages and the Circuit Judge's other findings in this case regarding Rule 23(b)(1)(A), do not support a conclusion that certification under Rule 23(b)(1)(A) is appropriate.

While cases have held that a "limited fund" theory may be a justification for a class action under Rule 23(b)(1)(B), as a matter of law, a trial court must give notice of and conduct a hearing on the factual issue of whether there is a limited fund and must allow the opponents of class certification to present evidence that a limited fund does not exist. See *In re Bendectin Prods. Liab. Litig.*, 749 F.2d at 306; *In re Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

*Stanley v. Illinois*, 405 U.S. 645, 656 (1968).

In any event, permitting an opt out would not deter settlements for several reasons. First, class actions for money damages under Federal Rule of Civil Procedure 23(b)(3), and state law equivalents, such as Alabama Rule of Civil Procedure 23(b)(3), already give class members that opportunity. Nevertheless, as a recent Federal Judicial Center study found, most damages class actions, both large and small, are settled, including many where some of the claimants have very substantial claims. Empirical Study of Class Actions in Four Federal District Courts – Final Report to the Advisory Committee on Civil Rules, 10, 59-62, 177 (Federal Judicial Center 1986). Second, where settlements provide meaningful benefits, unlike the present action, very few claimants will choose to run the risk of bettering the outcome by filing their own individual actions, unless they have very large claims and a strong likelihood of success. Indeed, generally the number of class members who exclude themselves from opt out class actions is generally very small. Empirical Study, *supra*, at 10, 52-54.

d. *Liberty National's Interest*. Liberty National may contend that it has relied on the settlement over the past

three years, but that is hardly a reason for denying a right to opt out. First, the case is still on direct appeal and Liberty National was fully aware of this contingency since the order approving the settlement specifically refers to the appeal process. (Pet. App. 99a-100a). Second, although an interest in repose exists in all cases that are resolved by settlement or by litigation, this interest is only one factor and must be viewed against the backdrop of class action litigation. The Third Circuit recognized in its decision allowing collateral attack in the *Ticor* litigation that:

[i]t is partly up to the defendant to safeguard the interest of the absent plaintiffs. *See [Shutts]*, 472 U.S. at 810, 105 S. Ct. at 2973. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to insure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

*In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770 (3d. Cir.), *cert. denied*, 493 U.S. 821 (1989). While Liberty National's interest in repose is entitled to consideration, even in the context of a later filed collateral attack, this interest has never been, and should never be, dispositive. *See Hansberry*, 311 U.S. at 40.

Liberty National is likely to argue that it has an interest in avoiding the costs of repetitive lawsuits, but that simply begs the question. Alabama law, and the law of all other states, protects the right of citizens to sue over the type of fraudulent conduct perpetrated here. The



threat of repetitive suits can be lessened by use of a class action settlement, even when an opt out right is provided, so long as the settlement provides fair relief to all those affected. Liberty National cannot complain that providing the right to opt out is too costly, when opt outs can be minimized, and possibly eliminated, by reasonable settlement terms that make resort to individual litigation unnecessary except in unusual circumstances.

e. *The Balance Lies Decidedly In Petitioners' Favor.* As set forth above, the Court's analysis in this case, even for Alabama residents, should be governed by *Shutts*. If the Court applies the *Mathews v. Eldridge* analysis, however, to decide whether the protection given class members was adequate, when judged by the standard of *Mathews*, there can be no doubt that Petitioners will receive the due process to which they are entitled only if the judgment below is reversed. See also *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

The validity and value of the monetary claims of class members which are eliminated by the settlement are well established, as the Alabama Supreme Court's decisions in *Boswell* and *McAllister* establish. The risk of erroneous deprivation is high, as the settlement broadly extinguishes class members' claims, including those for payment of the inflated premiums, while providing relief that is of little or no value to the vast majority of the class members. The only way to prevent this erroneous deprivation is to allow individual class members to control their own claims against Liberty National and others arising out of the cancer exchange program by affording them the right to opt out. The governmental interests in class litigation and settlement are outweighed by the

states' considerable interest in preventing their citizens from becoming the victims of unfair class settlements. And, finally, any interest of Liberty National in repose is not very substantial, when the case is on direct appeal and when Liberty National could have prevented the attack on the settlement by affording an opt out right.

Based on all these considerations, Petitioners will receive all the process to which they are due only if this Court refuses to foreclose their individual damages claims and upholds their right to opt out. When Petitioners' property interests in their claims for individual monetary damages, and the unfairness of foreclosing their damages claims in light of the relief afforded by the settlement, are balanced against the interests of the government and Liberty National, the scale weighs heavily in favor of requiring a right to opt out to avoid the erroneous deprivation of class members' property interests.

**C. The historical development of class actions demonstrates that the right to opt out is constitutionally mandated in a case involving claims "wholly or predominately" for money damages.**

Historically, the claims for individual money damages encompassed by this class action could never have been subject to mandatory class resolution. Class action jurisprudence prior to the 1966 Amendments to the Federal Rule of Civil Procedure 23 recognized the due process interest in claims for money damages, and thus the circumstances under which absentees could be subject to the *res judicata* effect of a class proceeding were strictly limited. Neither the 1966 change in the Federal Rules nor



the concomitant adoption of similar class action provisions by states such as Alabama have altered the due process limitations on the binding effect of class actions, and in this case class members have been denied their constitutional right to be free from that binding effect.

Prior to 1966, claims for damages could not be brought in a binding class action unless they involved assertion of a common legal right, or unless they were *in rem* claims against a naturally limited fund or resource. See, e.g., *Smith v. Swormstedt*, 16 How. 288, 57 U.S. 288 (1854) (claims against a church fund known as the "Book Concern"); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915) (claims to a limited insurance fund); *Leadville Coal Co. v. McCreery*, 141 U.S. 475 (1891) (distribution of assets of a corporation in receivership). Class actions under the 1938 version of Rule 23 were divided into three types: "true" and "hybrid" class actions that would bind all absent class members, and "spurious," or "common question" actions which required that absent class members "opt in." The "hybrid" actions that were antecedents of actions brought under modern Rule 23(b)(1)(B) were limited to cases involving equitable claims to recover and distribute "specific property." See 7A Charles A. Wright, Arthur Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1752 at 16 (1986). In contrast, if the claims of class members "had a direct effect on the personal rights or duties of individual class members by, for example, adjudicating contract rights or obligations determining tort liability[,] then the class action was "spurious" and did not bind non-participating class members. Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L.

Rev. 213, 282 (1990). Such spurious actions were in reality not class actions at all and were instead nothing more than a device for permissive joinder. 7A Wright, Miller & Kane, *supra*, § 1752 at 29.<sup>16</sup>

Although the 1966 Amendments to Rule 23 expanded the reach of class actions, they did so with a heightened recognition of the need to protect the due process rights of absent class members. With the adoption of Federal Rule of Civil Procedure 23(b)(3), the class device was for the first time applied to "common question" cases seeking damages at law. Recognizing that class members with claims at law for monetary damages are only afforded due process if they are allowed to control their individual claims by opting out, the drafters of the 1966 Amendments required that class members receive both notice and the right to opt out, Fed. R. Civ. P. 23(c)(2), in addition to the other procedural protections set forth in Rule 23. The 1966 Notes of the Rules Advisory Committee explicitly recognized that notice and the right to opt out were necessary to protect the due process rights of class members with damages claims:

[T]he interests of individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice

<sup>16</sup> Under the 1938 version of Rule 23, "spurious" classes were defined as involving rights which were "several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. R. Civ. P. 23(a)(3) (1938), 28 U.S.C. app. at 6101 (1964).

to the members of the class of the right of each member to be excluded from the class upon his request.

\* \* \*

[N]otice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. *This mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.*

*Notes of Rules Advisory Committee to 1966 Amendments to Rule 23, 39 F.R.D. 95, 105-07 (emphasis added) (citing, e.g., Hansberry v. Lee, 311 U.S. 32 (1940)).*

Prior to 1966, this case could only have been brought as a "spurious" class action that required knowing, affirmative, voluntary participation in order to bind class members. The fraud claims of the policyholders here unquestionably involve "joint and several" tort obligations. They are *in personam* claims against solvent defendants, rather than *in rem* claims against some common fund or property. Under such circumstances, due process demands that class members have the opportunity to exercise individual control over those claims by excluding themselves from the class.

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## CONCLUSION

This case demonstrates how class actions can be manipulated to trample the due process rights of the victims of fraudulent conduct by depriving them of the

right to opt out of a class action which extinguishes their individual and predominately monetary damages claims. The certification and settlement of this nationwide state court class action with no right to opt out violates due process. Accordingly, the holding of the Alabama Supreme Court should be reversed, and Petitioners should be allowed to opt out of the class settlement.

Respectfully submitted,

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## ALABAMA RULES OF CIVIL PROCEDURE

### RULE 23. CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or



(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or

not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(d) Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they

consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(dc) **District Court Rule.** Rule 23 does not apply in the district courts.

[Amended effective October 1, 1995.]

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## FEDERAL RULES CIVIL PROCEDURE

### RULE 23. CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the

representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:



(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(d) Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that



the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

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### NAMES OF PETITIONERS

Case No. 1931603 – *Guy E. Adams, et al. v. Charlie Frank Robertson, et al.*:

Guy E. and Alice S. Adams  
 Retha B. Attaway  
 Herman and Beatrice Bateman  
 Edna F. Brock  
 Hubert and Ruth Bullington  
 Dr. Neil Capper  
 Billy and Anna Clausen  
 John and Mary Day  
 Arthur and Peggy Dickinson  
 Edith E. Fellows  
 Mary L. Fowler  
 Leonard H. Griffith  
 Sara E. Griffith  
 Willard C. Griffith  
 Ellis and Joyce Harvell  
 John and Hazel Jefferson  
 Gussie and Willa Johnson  
 Lawrence A. Johnson  
 Johnnie and Bertha Jones  
 Jabie I. and Johnny Lane  
 Fred and Linda Lewter  
 James R. McGahagin  
 Martha Massengale  
 Seraphim Massengale  
 David W. Mooney  
 David and Catherine Nelson  
 Floyd E. and Delores H. Nelson  
 Ethel M. Offord  
 Rebekah Oliver  
 Geneva Parden  
 Mary Perez  
 Estelle Permenter, individually and as Executrix of  
 the Estate of Vernon E. Permenter

Arnold F. and Almitta Pitt  
 Rosa Lee Prosser  
 Alex and Doris Rivers  
 Ola Saxon  
 Joseph and Joy Savell  
 Brenda Sexton  
 John and Mary Stockman  
 Jean M. Sullivan  
 James R. and Linda S. Swilley  
 Dawn R. Tubb  
 John and Grace Turner  
 Colonel and Jeanne Weaver  
 Catherine H. Whigham  
 James and Betty White  
 Thomas White, as Executor for Edna M. White  
 Sheila White  
 Tommy White  
 Bertha Williams  
 Melvin and Rita Williams

Case No. 1931604 – *Thomas Beck, et al. v. Charlie Frank  
 Robertson, et al.*:

Thomas Beck  
 William Bostic, Jr.  
 Grover and Mary Bowdin  
 Rufus W. and Laura A. Burch  
 Ken and Harriett Brown  
 William and Peggy Chappelle  
 Clarence W. Coleman, Jr.  
 Cooper and Mazel Cowart  
 Esther Crabtree  
 John W. and Susan Curtis  
 William E. and Sue K. Davis  
 Norman Dicken  
 Debra Dickerson  
 Charles B. and Mary E. Duckworth  
 James and Ruth Elmore

Michael D. and Teresa Evans  
 James Faircloth  
 Lynn Fillingim  
 C. Henry and Patricia Fox  
 Emanuel A., Sr. and Gloria Gazzier  
 Carolyn C. Gray  
 Stella L. Gregory  
 John and Evelyn Harris  
 Elmore and Willie D. Harvison  
 Jimmy Harvison  
 Ruthie Harvison  
 Nettie Helton  
 Opal Herm  
 Pelham and Jewel Hollingsworth  
 Tony and Anita Hopper  
 Billy and Kathy Hoven  
 Cathy Howard  
 Andrew and Dwanna Howle  
 Andrew J. and Betty Howle  
 Ann Jacobson  
 Jimmy G. and Eloise James  
 Thomas and Aravictoria B. Kelly  
 James W. Kilgore  
 Clyde and Barbara Kohn  
 George and Mary Kountz  
 W. Guy LeCrory  
 Darrell and Michelle Ladnier  
 Joseph G. and Wanda R. Loftin  
 Paul and Beth Marshall  
 Michelle Mayberry  
 James and Sandra McGuff  
 George and Hazel Nicholas  
 Malcolm and Vivian Nicholas  
 Martha Partridge  
 Glenn and Margie Perkins  
 Thomas R. and Margaret L. Pierce  
 Diana Rampey

Felix and Lori Reynolds  
 Ernest Rhone  
 John M. Sirmon  
 John W. and Maybelle Sirmon  
 Bessie R. Tipp  
 Cecil R. and Peggy Trawick  
 A.C. Vickery  
 Margaret Vickery  
 Louis and Caroline White  
 Lena O. and Arthur Williams  
 Kimberly Wilson  
 Rodger and Paulette Wilson  
 Mr. and Mrs. Franklin Wood  
 Franklin Wood, Jr.

Case No. 1931605 – *David Cox, et al. v. Charlie Frank  
 Robertson, et al.*:

David & Elizabeth Cox  
 Julius E. & Doris Davis  
 William J. Miller  
 Susan Q. Miller  
 George W. Mears  
 Brenda M. Foster  
 Jessie E. Mears  
 Edward E. Russ  
 Charles E. Jones  
 James M. Jones  
 Andrew J. Stewart, Jr.  
 Peggy L. Winchester  
 Jerry & Marian H. Davis  
 Ernest L. Howze  
 William W. Howell  
 Billy R. & Arlene Huggins  
 John E. Harrington, Jr.  
 James Patrick & Anne McKeown  
 Sheila C. Hubbert  
 William J. Barbour

Robin E. Barbour  
 Arthur Perry Barbour  
 Carolyn D. Barbour  
 Elton M. & Elizabeth D. Gunnin  
 Noel & Rosemary Mount  
 Kathy L. Wilson  
 Dorothy A. White  
 Patricia S. & James A. Strength (deceased)  
 Naomi W. Strength  
 Nolan P., Jr. & Carol E. Cooper  
 Everitt & Deborah E. Averitt  
 Richard, Sr. (deceased) & Jessie H. Beckish  
 Patricia Sauce  
 Joseph & Claudia Wittner  
 Calvin E. Bosarge  
 Johnny M. & Josephine Farrior  
 Martin J. Powers  
 Diane D. Drew  
 Bonnie J. Rhodes Sprinkle  
 Martha L. & Brady S. Eubanks  
 William L. & Dorothy Darnell  
 Beatrice B. Waite  
 John H. Bull, Jr.  
 Jerald & Margaret Jaye  
 James E. Cook  
 Arland A. Cook  
 Bernice Finlay  
 Carlos & Delores R. Williams  
 N.H. & Joan Bankston on behalf of Bradford Smith &  
 Amy Smith  
 Betty Turner  
 Norma Jean Wittner  
 Myra Jean Wittner  
 Claudia Wittner as Guardian of Veronica Lynn Turner  
 Raymond & Joan N. Young



Case No. 1931606 – *Vernon E. Adamson, Sr., et al. v. Charlie Frank Robertson, et al.*:

Mr. and Mrs. Vernon E. Adamson, Sr.  
 Sybil R. Blackwell  
 Marsha N. Britton  
 Vera K. Bynum  
 Mr. and Mrs. Charles D. Byrd  
 Mr. and Mrs. James L. Calcote  
 Mr. and Mrs. William W. Chunn  
 Edwina C. Clearman  
 SaMartha B. Colvin  
 Janet Cook  
 Kenneth H. Cook  
 Helen H. Day, Ind. and as Executrix of Est. of  
 Raymond H. Day, Dec.  
 Ronald V. Dixon  
 Louise N. Dunaway  
 Carol B. Golden  
 Joseph R. Havard, and the Est. of Brenda L. Havard  
 Myrtle O. Hawman  
 Mr. and Mrs. Mark L. Howell  
 Mr. and Mrs. Foster L. Jones, Jr.  
 Jewel N. Jones  
 Ellen R. Lesley  
 Eunice W. Long  
 Myrna B. Matthews  
 Mr. and Mrs. Allen K. Middleton  
 Alberta D. Overstreet  
 Vivian C. Overstreet  
 Mr. and Mrs. Maurice E. Perkins, Jr.  
 Betty T. Phillips  
 Mr. and Mrs. George R. Reeves, Sr.  
 Mr. and Mrs. James R. Reeves, Sr.  
 Helen R. Rhodes  
 Mr. and Mrs. Carlton D. Robertson  
 Mr. and Mrs. Allen H. Ryals  
 Dorothy H. Scoggins

Thomas G. Scoggins, Jr.  
 Mildred L. Smith  
 Daniel A. Warren  
 Dorthy A. Warren  
 Randal S. Warren  
 Timothy J. Warren  
 Mr. and Mrs. Max L. Yates

Case No. 1931607 – *Darlene Skinner, et al. v. Charlie Frank Robertson, et al.*:

Darlene Skinner  
 Walton K. Skinner  
 Judy K. Gann  
 Jodie E. Gann  
 Teresa Mize, Ind. and as Executrix of Est. of Carol  
 Thomason  
 Jean Stoltz  
 Lena Latham  
 Howard F. Smith  
 Alfred Hancock  
 Elvis D. Ray  
 Magoline Ray  
 Randall L. Garner

Case No. 1931610 – *David L. Lynd, et al. v. Charlie Frank Robertson, et al.*:

David L. Lynd  
 Elizabeth S. Lynd  
 Pat DeSantis  
 Angela DeSantis  
 James V. Stowe  
 Wilanne S. Stowe  
 Juanita R. Stowe  
 Wesley R. Beech, Sr.  
 Margaret Beech  
 Donald Rayford Williams  
 Olga N. Williams  
 Mickie E. Ray

Willie J. Ray  
 Albert E. Ray  
 Cora Q. Ray  
 Patrick Ray  
 Donald L. Allen  
 Mary J. Allen  
 William A. Barnes  
 Alma G. Barnes  
 Grace Biondolillo  
 Sallie M. Conway  
 Deborah M. Cox  
 Tommy R. Cox  
 Della M. Finlay  
 Mrs. Lore Franklin  
 Douglas W. Howell  
 Daisy D. Howell  
 Lucille J. Jackson  
 Theodore W. Jockisch  
 Francis L. Jockisch  
 Lois N. Klaas  
 Phillip Bruce Lumpkin  
 Gloria W. Lumpkin  
 Floyd J. Miller  
 Annie G. Miller  
 James E. Mitchener, Sr.  
 Sally F. Mitchener  
 Hubert R. Odom  
 Catherin J. Odom  
 Thomas Wayne Smith  
 Sue Ann Smith  
 Warren G. Stanley, Jr.  
 Vicki H. Stanley  
 Norris F. Woodard  
 Lois M. Woodard  
 James E. Wooley  
 Linda C. Wooley  
 Ashton B. Cannon

Carolyn Cannon  
 Leslie C. Collings  
 Edna W. Collings  
 Lottie Trest  
 William C. Trest  
 William D. Knapp  
 Ruby Knapp  
 Ruby Walker  
 Jaime Phillips  
 Augustus L. Smith  
 Patricia L. Smith  
 Donald E. Smith  
 Karen K. Smith  
 David A. Rose, Sr.  
 Kay I. Rose  
 Essie Lee Taylor  
 Henry D. Whigham  
 Gloria Whigham  
 Ruby M. Taylor  
 Hiram R. Burge  
 William C. Smith  
 Jean M. Smith  
 Gail Pruitt  
 Bennie F. Baker  
 Gladys R. Baker  
 Joann B. Voivedich  
 Julian Tedder  
 Betty B. Tedder  
 Raymond Guy  
 Deborah Guy  
 Wyone Guy  
 Charles R. Gilbert  
 Delores M. Gilbert  
 Susan Trest Price  
 Rayford Hinton, Jr.  
 Judith C. Hinton  
 Robert Venek

Telecia Paulk (f/n/a) Telecia Gibbs  
 James P. Cazalas, Sr.  
 Brenda S. Cazalas  
 Leo C. Crain  
 Sandra E. Crain  
 Jesse M. Turner  
 Hugh F. McCoy  
 Byron D. Ray, Jr.  
 Lynn M. Ray  
 Joseph H. Lofton  
 Carel D. Bush  
 James F. Willis, Sr.  
 Anita D. Willis  
 Louie B. and Joye Spear  
 Kevin Morrow as Executor of Carol Morrow  
 Deborah R. McDonald as Executor of Largene C.  
 Rodgers  
 \*Guy Aubrey Bell  
 \*Elouise Bell  
 \*Joe Nance  
 \*Julia Nance  
 \*Oleta Davis  
 \*Prentiss Davis  
 \*Lucille L. Maples  
 \*Howard Maples  
 \*Jo Minter Bender  
 \*Bradis M. Crocker  
 \*Artis Crocker  
 \*James A. Bonniwell  
 \*James W. Scott  
 \*Betty Crawley  
 \*Vester Crawley  
 \*Ray Robert Garriga  
 \*Penelope De Santis  
 \*Annie M. Burge

---

\*The names of these Petitioners were inadvertently omitted from the list of Petitioners included in the Appendix to the Petition.

\*Dorothy A. McCoy  
 \*Fern Garriga  
 \*Clydia Alford  
 \*Luby Peterson

Case No. 1931611 – *Lucille Williams, et al. v. Charlie Frank Robertson, et al.*:

Lucille Williams  
 James C. Griswold  
 Joseph F. Watson  
 Betty Knowles  
 Neal Knowles  
 Aline Orso  
 Randy Touchstone  
 Phyllis Touchstone  
 Joseph Touchstone  
 Gloria Touchstone  
 June L. Barrow  
 Betty Terry  
 William Terry  
 Elizabeth Miller  
 Verna L. Cornelius

Case No. 1931614 – *Douglas C. Hammac, et al. v. Charlie Frank Robertson, et al.*:

Mr. and Mrs. Douglas C. Hammac  
 Pamela & Terry Knight  
 Mr. and Mrs. Victor Lazzari, Jr.

Case No. 1931615 – *Artemus Lane Nobles, et al. v. Charlie Frank Robertson, et al.*:

Artemus Lane Nobles  
 Anah Allen

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\*The names of these Petitioners were inadvertently omitted from the list of Petitioners included in the Appendix to the Petition.



Roger Bayles  
 Susan Davis Brown  
 Kristopher Kyle Dailey  
 Oscar H. Goree, Jr.  
 Ann Harden  
 Jeffrey H. Harden  
 Wilbur Harden  
 Charles Johnson  
 Mary Johnson  
 Irma Schaefer  
 Richard T. Schaefer  
 Betty Yarbrough  
 Sibley McKenzie  
 Loretta McKenzie  
 John R. Sellers

Case No. 1931616 – *Florence W. Clayton, et al. v. Charlie Frank Robertson, et al.*:

Florence W. Clayton  
 Thurman F. Clayton  
 Wayne F. Clayton  
 Iveynelle Clayton  
 Woodrow Johnston  
 Gladys D. Johnston, Deceased  
 Eula Mae Books

Case No. 1931617 – *Larry L. Andrews, et al. v. Charlie Frank Robertson, et al.*:

Larry L. Andrews  
 Jane M. Ankerson  
 Rosalie B. Ankerson  
 Edward J. Arata, Jr.  
 August T. Bozant  
 Teresa R. Bozant  
 Mr. and Mrs. Thomas Brettel  
 Joseph E. Broughton  
 Susan L. Brown (Lewis)

Mr. and Mrs. Michael Burgess  
 Madeline K. Burnes  
 Linda D. Butts  
 Richard S. Butts  
 Robert C. Butts  
 William H. Butts  
 Shirley & Jesse Carlisle  
 James P. Cofield  
 Barbara Cooper  
 Lillie J. Cooper  
 Pat Estes  
 Ruth F. Granade  
 Daphne P. Kelley  
 Douglas E. Kelly  
 Berry Kitchens  
 Doris Hewett  
 John S. Hewett  
 Mr. and Mrs. Robert Holifield  
 Mr. and Mrs. George Lewis  
 Ms. Shawn M. Lewis  
 Mr. and Mrs. Byron Lundy  
 Lucille McPherson  
 Kevin McPherson  
 Catherine A. McRae (Beck)  
 Lucille L. McRae  
 John A. McRae  
 Monica G. Merifield  
 Catherine M. Parker  
 Estate of Ms. Jewell Pierce, Deceased  
 David Pitt  
 Mr. and Mrs. Melvin Pitt  
 Mr. and Mrs. Michael Presley  
 Rhonda L. Pulliam  
 Jerry L. Pulliam  
 Douglas Revere  
 Richard Russell  
 Nelma G. Shewmake

Curtis L. Shewmake  
Cleveland Smith  
Mr. and Mrs. Gary Smith  
Cecilia R. Street  
John D. Turner, II

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No. 95-1873

Supreme Court, U.S.

FILED

DEC 6 1996

CLERK

**In The  
Supreme Court of the United States  
October Term, 1996**

—◆—  
**GUY E. ADAMS, et al.,**

*Petitioners,*

**v.**

**CHARLIE FRANK ROBERTSON and  
LIBERTY NATIONAL INSURANCE COMPANY,**

*Respondents.*

—◆—  
**On Writ Of Certiorari  
To The Supreme Court Of Alabama**

—◆—  
**BRIEF OF AMICUS CURIAE, STATE OF ALABAMA,  
IN SUPPORT OF RESPONDENTS**

—◆—  
**JEFF SESSIONS**

**Attorney General of Alabama**

**WILLIAM H. PRYOR JR.\***

**Deputy Attorney General**

**11 South Union Street**

**Montgomery, Alabama 36130**

**(334) 242-7401**

***\*Counsel of Record***



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## INTERESTS OF THE AMICUS CURIAE

Several states have filed a brief that addresses concerns about the potential abuses of class action settlements, but those states, "do not take a position on the merits of the underlying dispute before the Court." (Brief for states of New York, et al., at 1.) Because this dispute arose in Alabama, the Attorney General of Alabama believes it is necessary to comment on the merits of this dispute. Although the Attorney General of Alabama shares the concerns expressed by the other states, this Brief will explain why this Court should not reverse the judgment of the Supreme Court of Alabama.

The State of Alabama has three substantial interests in this case. The first interest is consumer protection. State attorneys general have a special role in the enforcement of consumer protection laws. The Attorney General of Alabama routinely monitors class action settlements in consumer cases, intervenes in many of those cases, and objects to settlements that are contrary to the best interests of class members and other consumers. The Attorney General of Alabama recognizes, however, that settlements of class actions can provide, in appropriate cases, superior relief for complaints of consumers and, therefore, should not be discarded entirely.

The second interest is the traditional role of the States in the regulation of insurance. See *Wilburn Boat v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 316 (1955) ("The control of all types of insurance companies and contracts has been primarily a state function since the states came into being."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). This case involves a defendant insurance company sued

in its home state of Alabama, under the laws of that state. More than ninety-eight percent of the petitioners are residents of Alabama, and more class members reside there than in any other state. The regulation of the conduct of the defendant insurance company is primarily the job of the State of Alabama. A major departure from settled notions of the state processes available to resolve disputes between insureds and insurers could frustrate the regulatory schemes of several states.

The third interest of the State of Alabama is the preservation of our federalism. States have a vital interest in ensuring that the interpretation of state rules of civil procedure by state courts remains a state, not a federal, concern. As this Court has explained, "The Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution are reserved to the States, respectively, or to the people.' U.S. Const., Amdt. 10. The states thus retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

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#### STATEMENT OF THE CASE

The issue in this case arises in the context of complaints that Liberty National Life Insurance Company fraudulently induced holders of a cancer insurance policy to switch to a new policy that allegedly resulted in narrower coverage for cancer patients. Liberty National contended that the complaints are without foundation and that the vast majority of its customers received better coverage under the new policies. The parties entered into

settlement discussions that the trial court found were "conducted at arms-length, without collusion," and agreed to a settlement that the court found to be "the result of hard and intense bargaining by able counsel on both sides." Pet. App. 34a, 36a.

Under that settlement, Liberty National agreed, *inter alia*, to reform its cancer policies to eliminate the new limitations on coverage that had been imposed under the new policy, provide restitution of 100 percent of the loss of benefits to cancer victims, and create two funds, totaling \$4 million, to cover expenses incurred by class members in connection with treatment that would have been covered under the former policy. As an integral part of the settlement, members of the class were provided notice and an opportunity to be heard but could not opt out of the settlement, if the court approved the settlement.

Approximately one-quarter of one percent of the 400,000 class members objected to the proposed settlement. After an extensive fairness hearing, the trial court approved the settlement on the condition that the restitution be increased to 150 percent of loss, that the funds established to cover expenses be increased to \$11 million, and that an agreed upon freeze on premium increases be extended. Those modifications were accepted and the settlement was approved.

With respect to the issue presented by the petitioners – approval of the class without an opt-out provision – the trial court expressly found that an opt out "would be detrimental to the interests of the class members and the class as a whole" in the light of the "inherent conflicts that would ensue between class members and individual



punitive damage suits if opt-outs were permitted." Pet. App. 85a. Specifically, the court found that "[i]f opt-out were permitted, a few class members who opt-out, if successful in their individual lawsuits, could receive an early trial and would no doubt attempt to recover punitive damages for the entire pattern and practice of conduct here, to the detriment of the remaining class members." Pet. App. 86a. Such a result, the court found, is not required by the Constitution "and is neither desirable nor appropriate." Pet. App. 85a-86a.

On appeal, the Alabama Supreme Court rejected the claims of the objecting class members that they were entitled to an opportunity to opt out of the settlement class. That a class action under Alabama Rule of Civil Procedure 23(b)(1) or 23(b)(2) "may ultimately result in money damages does not prevent class certification," the Court held, concluding that "so long as the relief sought is primarily equitable or injunctive, a class action settlement that also includes money damages with a non-opt-out provision is proper." Pet. App. 12a (emphasis in original) (citing *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert denied*, 115 S. Ct. 2569 (1995)). The Alabama Supreme Court further determined that the relief awarded in this case was primarily equitable in nature, because the most significant relief was reformation of the insurance contracts and an injunction preventing Liberty National from switching insurance policies without providing certain information. Accordingly, the court held that the absence of an opt-out procedure in this case did not render the certification and settlement unconstitutional.

As to fairness of the terms of the settlement itself – which is not at issue before this Court – the Alabama Supreme Court found that the trial court had not abused its discretion in approving the settlement and that it had given due consideration to the appropriate factors, including the likelihood of success at trial, the range of possible recovery, the complexity, expense and duration of the litigation, the substance and amount of opposition to the settlement, the stage of the proceedings at which the settlement was reached, and the financial ability of Liberty National to withstand judgments in the absence of a settlement. Pet. App. 17a.

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#### SUMMARY OF ARGUMENT

This case involves a settlement that primarily reformed the cancer insurance policies of approximately 400,000 policyholders who were allegedly defrauded by an Alabama insurance company. Although the petitioners – more than ninety-eight percent of whom are from Alabama – note that the plaintiff's attorney and the lower courts have a reputation regarding large punitive damages, the petitioner's main objection is that the class settlement deprives them of the opportunity to pursue that speculative but potentially lucrative remedy. The Due Process Clause of the Fourteenth Amendment does not guarantee the right to participate in a punitive damages lottery in which compensation may be denied to most of those injured in a mass tort case.

There are three important state interests at stake here. The first interest is consumer protection. This Court

should not deprive consumers of the ability to obtain broad and meaningful relief through the use of mandatory classes in appropriate cases. The second interest is federalism. This Court should defer to the reasonable determination of the Supreme Court of Alabama that this settlement provides primarily equitable relief. That deference is particularly appropriate in this case where more members of the plaintiff class reside in Alabama than in any other state and the defendant is an Alabama insurance company. The third interest is in preserving the settled law regarding Federal Rule of Civil Procedure 23 and the state rules that follow that model. That interest is especially strong in this insurance case, because insurance regulation is traditionally the province of the states. Alabama law extends to policyholders and insurers a procedure borrowed from the federal courts to resolve disputes in a manner that affords substantial relief to every policyholder. That procedure also promotes judicial economy in immeasurable ways.

---

### ARGUMENT

This case is not what it may first appear to be. Although this case arose in the Circuit Court of Barbour County, Alabama, which, as the petitioners note, has a reputation for frequent and large punitive damages awards, the settlement of this case does not conform to that reputation. This case involves a settlement that primarily reformed the cancer insurance policies of approximately 400,000 policyholders who were allegedly defrauded by an Alabama insurance company. The petitioners – more than ninety-eight percent of whom are

Alabama residents – are a vocal but tiny fraction of those policyholders who object to the settlement, because they want to pursue speculative but potentially lucrative legal remedies, particularly punitive damages. The petitioners are not advocates of civil justice reform: The petitioners cast aspersions toward the reputation of the lower courts and the national reputation of the plaintiff's attorney, but the petitioners' real objection is that they have been denied the opportunity to participate in a system where large punitive damages may be awarded to a few and compensation may be denied to most members of the plaintiff class.

This Court, of course, should never shirk its duty of enforcing the fourteenth amendment and ensuring that due process is afforded by every state to every citizen. There may be instances in which class actions are settled in a manner that raises substantial issues regarding due process. This Court should be vigilant in its review of potentially abusive class actions. This Brief will explain, however, some of the reasons why this case does not warrant the intervention of this Court.

This Argument is divided into three parts. Part one addresses the propriety of using a mandatory class action to protect consumer interests. Part two addresses the federalist concern that this Court should defer to the determination of the state courts regarding the primary nature of the relief in a class action settlement. Part three addresses the need to preserve settled notions of the propriety of mandatory class actions, particularly as they relate to the traditional role of the states in regulating insurance.



**I. The Ability to Settle Litigation Through the Use of Mandatory Classes, in Some Cases, is Necessary to Protect Consumer Interests.**

The issue in this case has significant implications for all parties interested in the just and efficient resolution of otherwise unwieldy and cumbersome public interest litigation. During the past several decades, our legal system has seen an explosion in the incidence of mass tort litigation and in other litigation involving the individual claims of, in some instances, hundreds of thousands of individuals. These claims may involve product liability disputes, civil rights violations, or anticompetitive practices, just to name a few. At the same time, however, the number and the scope of claims involved in these disputes threaten to overwhelm the legal system and to delay indefinitely the resolution of claims that plainly should be redressed. Although sound public policy demands that those who are injured by massive fraud or negligence have the opportunity to pursue their claims, it likewise demands that there be some mechanism for gaining final, binding, and effective relief, and ensuring that the interests of all those injured – not just a select few – are protected. In many, if not most, cases fitting under this rubric, the class action is an appropriate and fair mechanism for securing justice.

The interests of consumers provide support not only for proceeding through the mechanism of a class action but for the swift and efficient resolution of these disputes through settlement. To achieve settlements in these circumstances, the absence of an opt-out provision may be a fundamental prerequisite. Unless a defendant facing hundreds or thousands of claims can know with certainty

that all of those claims will be resolved, there is little or no incentive to enter into far-reaching settlements with most of the class. Especially in this time of large punitive damage awards, the presence of even a handful of remaining litigants offers a sufficiently ominous future liability potential that there is little to be gained from resolving even a large majority of claims. If the Supreme Court rules that an opt out is required in all circumstances, therefore, multiple individual lawsuits will be the order of the day.

A regime in which multiple individual lawsuits are the means to resolve mass tort or fraud claims, however, can be inherently unjust to most of the alleged victims of those actions. Although the first plaintiffs in the door may well fare better than under a class settlement by securing massive punitive damage awards, they do so at the expense of the majority of the members of the class, for whom nothing will be left once the first few plaintiffs take all available funds. Plaintiffs securing large punitive damage awards will be much more than compensated for any injury, while many others suffering the same injury will be left with nothing. Furthermore, the multiplication of litigation itself will only increase the likelihood of unjust results. No public policy interest of which we are aware is served by such an arbitrary regime, and those state officials charged with responsibility for consumer protection have a keen interest in preventing such a result.

This Court should be mindful of the utility of mandatory classes and the damage that would be wrought if settlements involving such classes could be undone by an



unhappy few seeking the windfall of large punitive damage awards and attorneys' fees without regard to the interests of other class members or the public policies served by class action settlements. If the petitioners in this case had been permitted to opt out and pursue individual compensatory and punitive damages claims, the settlement may not have occurred, the policies may not have been reformed, and the restitutionary remedies may not have been offered, all to the detriment of the class as a whole. The Supreme Court should preserve the continuing ability of class representatives and defendants to work out mutually beneficial solutions in the best interests of the class as a whole and reject petitioners' effort to deprive the legal system of the ability to facilitate such results.

**II. The Supreme Court Should Defer to the Determination of the Alabama Supreme Court that the Relief Provided Under State Law was Primarily Equitable.**

As the matter has been presented in the petition (see, e.g., Pet. at 21), and as the Supreme Court framed it in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the key question is whether the relief at issue in this state law cause of action arising in state court was wholly or predominantly a money judgment. While the Court in *Shutts* determined that – at least as a matter of personal jurisdiction in that case – an opt-out requirement was an element of due process, it expressly limited its holding to “those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments,” and “intimate[d] no view concerning other types of class actions, such as those seeking equitable relief.”

*Shutts*, 472 U.S. at 811 n.3. In this case, following the lead of *Shutts*, the Alabama Supreme Court determined that the relief was primarily equitable or injunctive and, therefore, a mandatory class settlement was proper.

In asking this Court to reverse the judgment, the petitioners have asked this Court to override a state supreme court's characterization of the relief approved in a state law action as equitable or legal in nature. That question, however, is and should be primarily one for the state supreme court. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.”). The interests of the States as participants in our federal system require that state institutions – such as the Alabama Supreme Court – determine the appropriate meaning, content, and characterization of state law.

This class action plainly should have been brought in Alabama. More members of the plaintiff class reside in Alabama than in any other state, and more than ninety-eight percent of the petitioners reside in Alabama. The defendant is an Alabama insurance company regulated under Alabama law. This case is not the archetypical abusive class action brought by less than able representatives in a forum that is too distant for the vast majority of the members of the plaintiff class and has only a remote connection with the defendant. Indeed, the plaintiff's attorney has a national reputation for securing generous awards for his clients, particularly in the trial court where this case was filed.

In any event, the characterization of the primary relief as equitable was reasonable and should not be disturbed. The plaintiffs in this litigation complained that they had been fraudulently induced to switch their cancer insurance to new policies providing less comprehensive coverage. As part of the settlement, the defendant agreed to a reformation by which the earlier coverage was restored. That reformation resolved the central issue in the dispute for the vast majority of members of the class, who had made no claims under any cancer policy. Reformation, of course, is an equitable remedy that does not involve monetary relief. To be sure, for some members of the class, a restitutionary remedy accompanied the reformation, while others were entitled to receive monetary relief from one of the damages funds. But the presence of some monetary relief for some members of the class does not undermine the obvious conclusion that the nonmonetary restitutionary remedy was entirely sufficient to meet the primary complaint that the new cancer policy provided reduced coverage.

**III. The Supreme Court Should Not Upset the Settled Determinations Reflected in the Federal Rules of Civil Procedure and in State Procedural Rules Modeled on the Federal Rules that an Opt-Out is Not Required, or Beneficial, in all Class Actions.**

The rule urged by petitioners would undo the carefully crafted and considered judgments of Rule 23 of the Federal Rules of Civil Procedure and the many state class action rules modeled on the Federal Rules. Under those rules, only classes certified pursuant to Rule 23(b)(3) must provide an opt-out right. The petitioners, however,

would have the Court rewrite those rules through constitutional fiat by requiring as a matter of the Due Process Clause that a great many more classes be accompanied by an opt-out right. If the Court imposes an opt-out requirement where the rules do not presently call for such an option, the settled and tested distinctions found in Rule 23 would be erased and the utility of class actions would be reduced in areas where they are arguably needed most.

This Court has long recognized that a judgment in a class action may bind absent members of the class so long as the class members were adequately represented. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). In the settlement context, due process may also requires notice and an opportunity to be heard. The Supreme Court of Alabama found that these traditional requirements were satisfied in this case.

This Court in *Shutts* made clear its reluctance to "require the invalidation of . . . the class action provision[s] of the Federal Rules of Civil Procedure." 472 U.S. at 813. Those provisions were crafted with the benefit of the considered judgment of their drafters and have been tested over time in hundreds of cases. Judicial economy in both state and federal courts has been advanced enormously by the use of class actions. In the interests of comity and federalism, this Court should be all the more reluctant to invalidate state procedural rules patterned on the federal model.

This is particularly true in the context of an insurance case. Regulation of insurer practices and protection of the interests of insureds has traditionally been the province

of state insurance commissioners, who are cognizant of local needs and conditions and have considerable experience in the area. This is not to say that court actions that might affect insurer practices and solvency are preempted, but the predominant role of state regulation strongly suggests that state law procedures should not be displaced in a manner that seriously undermines the state regulatory system. See *Wilburn Boat v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 316 (1955) ("The control of all types of insurance companies and contracts has been primarily a state function since the states came into being."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Here Alabama law provides policyholders and insurers a means of resolving a dispute such as the present one in a manner that affords real relief to every class member, while affording finality and certainty to the insurer concerning its obligations. Petitioners' position would deny that option as a matter of federal law, jeopardizing the interests of insured and insurer alike and the interests of all states in promoting judicial economy. State officials have a keen interest in resisting such an unsettling intrusion, which threatens to disrupt carefully crafted regulatory and judicial regimes.

---

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Supreme Court of Alabama.

Respectfully submitted,

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OCTOBER TERM, 1996

GUY E. ADAMS, et al.,  
v. *Petitioners,*

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,  
*Respondents.*

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### **QUESTION PRESENTED**

Whether the Due Process Clause of the Fourteenth Amendment confers on class members subject to a state court's jurisdiction an absolute right to opt out of a properly certified class action, where the relief sought and won for the class is predominantly equitable and where the primary basis for the request to opt out is the objecting class members' desire to pursue separate awards of punitive damages.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

—  
No. 95-1873  
—

GUY E. ADAMS, *et al.*,  
v. *Petitioners,*

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,  
*Respondents.*

—  
On Writ of Certiorari to the  
Supreme Court of Alabama  
—

BRIEF FOR RESPONDENT  
CHARLIE FRANK ROBERTSON

—  
JURISDICTION

As discussed in Part I of the Argument, petitioners failed to raise their current federal claim in the Alabama Supreme Court and that court did not address the issue. This Court has indicated that such a failure to preserve a federal claim in an action coming from state court may present a jurisdictional bar to review here. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

STATEMENT

In this class action in Alabama state court, the plaintiff, respondent Charlie Frank Robertson, alleged that the defendant, respondent Liberty National Life Insurance Company, had engaged in a centrally orchestrated effort



to defraud the more than 400,000 holders of its cancer insurance policies into exchanging their existing policies for new ones that provided more limited coverage. The court certified a class of all affected insureds pursuant to Alabama Rule of Civil Procedure 23(b)(1) and (2) and, after extensive negotiations, the parties proposed a class settlement that provided a combination of injunctive relief, including extensive policy reformation, for the whole class and monetary relief, including full restitution of lost benefits, for class members who suffered substantial injuries. The settlement ensured that *all* members of the class would have insurance coverage as broad as, and in most instances broader than, the coverage they would have received absent the alleged fraud. It provided a direct financial benefit to all class members by temporarily freezing Liberty National's premium rates. Finally, it gave to those class members who actually were denied benefits because they had switched to the new policies both full restitution and supplemental monetary relief.

The settlement was nevertheless met with objections by approximately 1000 class members, or about 0.25% of the policyholders in the class. Although almost none of these objectors claimed to have suffered more than modest out-of-pocket losses (through payment of higher premiums) as a result of the fraudulent conversion of their insurance policies, they complained that they should have been allowed to opt out of the class and pursue individual lawsuits seeking damages for mental anguish and punitive damages. The trial court denied all requests to opt out but carefully scrutinized the proposed settlement and conditioned its approval on Liberty National's acceptance of changes that secured additional benefits for the class.

On appeal, the Alabama Supreme Court unanimously rejected the objectors' arguments that the denial of an opportunity to opt out violated their right to a jury trial under the Alabama constitution and that the settlement was not fair. Petitioners' current claim—that the Fourteenth Amendment's Due Process Clause gives them a right to

opt out—was not raised in petitioners' briefs, or oral argument, and was not addressed by the court.

**The Liberty National Exchange Policy.** From 1969 until the early 1980s, Liberty National issued a series of "cancer insurance" policies, most of which were "guaranteed renewable for life" subject to rate increases. Joint Appendix ("J.A.") 564. Many of these policies provided, among other benefits, for unlimited reimbursement of radiation, chemotherapy, and prescription drug expenses incurred in connection with treatment for cancer. J.A. 564-65.

Beginning in 1986, Liberty National introduced a series of so-called "new" policies and initiated a company-wide program designed to encourage holders of the "old" policies to "switch" to these new policies. J.A. 567-69. The new policies provided a number of significant benefits that the "old" policies did not offer, but eliminated coverage for certain prescription drugs and introduced daily and annual monetary limits for coverage for radiation and chemotherapy expenses. J.A. 567-68, 772-95, 796-815.

**The Robertson Action.** On October 2, 1992, respondent Charlie Frank Robertson amended an unrelated complaint against Liberty National pending in Barbour County Circuit Court to include claims that Liberty National had defrauded him and a class of cancer policy insureds through a "pattern or practice" of exchanging or attempting to exchange "old" policies for "new" policies that offered benefits that were "much less" extensive. J.A. 37-38.<sup>1</sup> The prayer for relief requested "an adjudication by the Court relating to the cancer policies being switched"; judgment "for the full amount of injuries and

<sup>1</sup> Robertson's initial complaint set forth an unrelated claim relating to Liberty National life insurance policies, *see* J.A. 31-33; this claim was later settled. *See* J.A. 92. The trial court found that the disposition of the life insurance claim was "arms-length" and "in no way impugns the integrity of negotiations" in the cancer policy class action. Petition Appendix ("Pet. App.") 28a.

damages suffered by the members of the class"; "injunctive relief as deemed necessary by the Court," and other relief. J.A. 39. An accompanying motion sought class certification under Alabama Rules of Civil Procedure 23(b)(1), (b)(2), and (b)(3). J.A. 42-43.<sup>2</sup> Robertson later filed a second amended complaint in which he additionally sought restitution for persons who had had claims denied as a result of the fraud and requested that the "new" policies be reformed to "provide all the benefits of the 'old policy' as well as additional benefits first in-

<sup>2</sup> Before certification of the class, class counsel filed three separate suits in Barbour County Circuit Court on behalf of a total of six individual Liberty National cancer policy insureds. See *Peel v. Liberty Nat'l Life Ins. Co.*, No. CV-92-055 (filed October 6, 1992; motion of Jere L. Beasley to withdraw as counsel granted February 23, 1994; dismissed with prejudice April 28, 1994); *Gould v. Liberty Nat'l Life Ins. Co.*, No. CV-93-024 (filed March 9, 1993; plaintiffs' "Request for Dismissal and Inclusion in Class Action" granted February 14, 1994); *Stewart v. Liberty Nat'l Life Ins. Co.*, CV-93-025 (filed March 10, 1993; dismissed without prejudice July 19, 1993). See also J.A. 45, 79, 82, 86.

Petitioners and their *amici* would make much of these three lawsuits, e.g., Petitioner's Brief ("Pet. Br.") 27-28, but none of these separate actions had the purpose or effect of favoring individual clients over the class. The *Peel* case was filed four months before class certification in this action. Class counsel Beasley did not believe Ms. Peel to be within the definition of the class, see Fairness Hearing Tr. 807, 811-12, but *withdrew* from representing her well before judgment in either *Peel* or *Robertson*. Two *Stewart* plaintiffs (former Liberty National executives) testified at the fairness hearing that their actions were filed because of uncertainty about the scope of the class definition in *Robertson*. Fairness Hearing Tr. 311, 363-64. The *Stewart* action, and the *Gould* action as well, were voluntarily dismissed prior to the approval of the settlement of the class action. The plaintiffs thereupon became members of the *Robertson* class and are bound by the settlement no less than other members of the class. Petitioners' aspersions against class counsel, echoed by *amici*, ignore these facts, are thus entirely unfair, and do not call into question the trial court's findings that class counsel zealously pursued the interests of the entire class. See Pet. App. 28a, 32a, 34a, 36a-37a, 50a, 71a, 82a-83a, 90a.

cluded in the 'new policy'." R. 220C-22C (docket entry listed at J.A. 4).

**Class Certification.** On October 16, 1992, the court held a hearing on class certification. Liberty National opposed the motion for certification and requested a continuance to pursue discovery. J.A. 50-74. On March 8, 1993, at the next hearing on the issue, Liberty National renewed its opposition to certification. J.A. 74-75. On March 10, 1993, however, the trial court certified a class under Rule 23(b)(2) of the Alabama Rules of Civil Procedure consisting of all persons who, on or after August 29, 1986, were insured under Liberty National cancer policies providing unlimited coverage for radiation, chemotherapy, and out-of-hospital prescription drugs, excluding persons who had filed their own suits prior to March 10, 1993. J.A. 89-90. Certain members of the class thereupon objected, intervened, or both, challenging the certification and mandatory nature of the class. E.g., J.A. 93, 96, 99, 107.<sup>3</sup>

**The Proposed Settlement.** The parties engaged in lengthy settlement negotiations after the certification, Petition Appendix ("Pet. App.") 36a, and on June 16, 1993, they filed an executed settlement for the court's approval. J.A. 127-65. The proposed settlement provided a broad array of benefits to the class. See Pet. App. 39a-40a (trial court's summary). It provided that: the policies of class members who had "switched" from old to new policies would be reformed so as to restore all the coverage provided in the old policies *in addition to* the expanded benefits provided in the new policies, J.A. 141-42; policy-

<sup>3</sup> After certification, various parties attempted to bring separate actions challenging Liberty National's cancer policy exchange program, e.g., J.A. 110, including a new class action raising "virtually identical" claims filed by objectors in the circuit court of Mobile that was ultimately stayed by the Alabama Supreme Court due to the Barbour County court's prior assertion of jurisdiction in the *Robertson* action. See *Ex parte Liberty Nat'l Life Ins. Co.*, 631 So. 2d 865, 868 (Ala. 1993).



holders whose "old" policies lapsed after the institution of the exchange program would have the option of reinstating their old policies, without payment of past premiums and without regard to present insurability, J.A. 139-40; class members' claims experience would be "pooled" for rate filing purposes, J.A. 143-44;<sup>4</sup> and premiums on "old" and "new" policies would not be increased by Liberty National before January 1, 1995. J.A. 144. The agreement also included injunctive relief against any future fraudulent switching of policies.

The settlement provided three distinct monetary remedies for class members who had "switched" from old to new policies, contracted cancer, and suffered a loss of benefits.<sup>5</sup> First, it guaranteed complete restitution of any net reduction of overall benefits to which these class members would have been entitled under the old policies, and established a claims procedure to identify eligible class members. J.A. 145. In addition, a \$1,000,000 "Incidental Monetary Settlement Fund" was to be distributed among class members who had submitted claims for radiation, chemotherapy, or prescription drugs that were not fully covered under new policies. J.A. 144-45. A \$3,000,000 "Supplemental Extracontractual Monetary Relief Fund" was to be distributed among those entitled to restitution. J.A. 149-50.

<sup>4</sup> The pooling remedy, one of several important types of relief in the settlement that petitioners *never acknowledge* in their brief, was designed, among other things, to address claims that Liberty National's policy exchange program had distorted rates by diminishing the risk pool upon which some class members' premiums were based.

<sup>5</sup> Petitioners contend that there is "no logical explanation" why "only this limited group" received monetary relief under the settlement. Pet. Br. 26. But it was clearly appropriate to allocate the monetary relief to those class members who had actually had cancer claims denied because of the benefit limits in the new policy; other class members' injuries were far more attenuated, and were fairly compensated by the various forms of equitable relief provided in the settlement. See, e.g., Pet. App. 15a-16a.

The agreement was contingent upon the trial court's approval of "a Rule 23(b)(2) mandatory class with no right to opt out," and a final court order barring class members from filing new claims based on Liberty National's cancer policy exchange programs. J.A. 151, 159. It provided for Liberty National to pay class counsel's fees, in an amount to be determined by the court not to exceed \$4.5 million. J.A. 154-55.<sup>6</sup>

Based on extensive actuarial testimony, the trial court later found that the pecuniary value of the proposed settlement agreement as proposed—not counting "certain other valuable injunctive and equitable benefits" that were "not measurable pecuniarily"—was at least \$39.4 million. Pet. App. 41a.

**The Fairness Hearing.** On June 16, 1993, the trial court preliminarily approved the proposed settlement, "reaffirm[ed]" its certification of the class action under Alabama R. Civ. P. 23(b)(2), and set a date for a fairness hearing pursuant to Rule 23(e) to be held after individualized notice to the class. J.A. 168, 170, 171-73, 177. In anticipation of the hearing, the court later ordered class counsel to produce to objectors all Liberty National documents relied upon by class counsel in evaluating the company's settlement proposals and all transcripts of depositions taken in the case, and to make available for a deposition the actuarial expert class counsel had retained to evaluate the case and the settlement. See Pet. App. 47a-48a. After notice to the class, only 707 class members—less than one-quarter of one percent of the policyholders in the class—filed written objections prior to the October 1993 deadline. J.A. 622-43. The court agreed to entertain the arguments of another 301 objectors filed after the deadline. J.A. 644-49.

<sup>6</sup> In the Alabama Supreme Court, petitioners did not challenge the reasonableness of the court's ultimate award of \$4.5 million in fees payable by funds separate from the relief provided to class members, see Pet. App. 40a. The award was amply supported by testimony from class counsel and by expert testimony.



The fairness hearing was held on January 20, 21, and 24, 1994. The court heard extensive testimony, including testimony from any objector who wished to appear, and received a large volume of documentary evidence. *See* Pet. App. 24a-27a. After the hearing, respondents jointly moved for an order certifying the class for settlement purposes under Alabama Rules of Civil Procedure 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2). J.A. 386-87.<sup>7</sup>

**Conditional Approval of the Settlement Subject to the Court's Modifications.** On February 4, 1994, the court filed an order and judgment conditionally approving the settlement and granting the motion to certify the class under Rules 23(b)(1)(A) and 23(b)(1)(B) as well as Rule 23(b)(2). *See* J.A. 394-95. The court found that "if this action were not maintained as a class action, Liberty National could very likely be placed under inconsistent directives," such as conflicting orders to reform the new policy or injunctions requiring "pooling" of policy groups. J.A. 395. The court also found that the assets of Liberty National were a "limited fund" subject to exhaustion in the event of lawsuits by even a small percentage of the 400,000 cancer policyholders in the class, especially by multiple actions seeking punitive damages. J.A. 395-96.

The trial court concluded "that the settlement, if modified in certain respects, is fair, reasonable and adequate and ought to be approved." J.A. 398.<sup>8</sup> The required modifications included substantial increases in all three forms of monetary relief: the restitution due class mem-

<sup>7</sup> The trial court characterized this motion as "essentially a request for an amendment seeking to conform the class certification to [the] evidence actually submitted at the Fairness Hearing." J.A. 394.

<sup>8</sup> The court explained that it had imposed the modifications not because the settlement as proposed was unfair to the class, but to ensure "sufficient punitive equitable and monetary relief against Liberty National to effectively remove and exceed all profits or gain made by Liberty National from the exchange of class members' policies." Pet. App. 51a-52a.

bers who had experienced an overall reduction in benefits would increase from 100% to 150%; the "Supplemental" fund would increase from \$3,000,000 to \$9,000,000, and the "Incidental" fund would increase from \$1,000,000 to \$2,000,000. J.A. 398-99. The court further demanded that: (1) the premium freeze provisions of the proposed settlement be extended; (2) future premium increases for any class members be limited so that the increases could not yield expected loss ratios below 55%, so as "to remove any opportunity for Liberty National to recover the costs of this settlement through future rate increases"; (3) class members holding "old" policies be given the opportunity to obtain "new" policies (as reformed by the settlement to include the benefits of the old policies as well); and (4) the reformation provisions of the agreement providing expanded benefits be deemed to relate back to June 16, 1993. J.A. 400-01.

**Final Approval of the Settlement.** After the class representative and Liberty National accepted these modifications, the court, on May 26, 1994, entered its order and final judgment approving the settlement agreement as modified, Pet. App. 93a-106a, together with extensive findings of fact and conclusions of law, *id.* at 21a-92a. The court found that class counsel had "vigorously bargained for the best possible settlement and ha[d] ultimately obtained a settlement which this Court finds to be fair and reasonable to all members of the class." Pet. App. 37a.<sup>9</sup> The court concluded that the total value of the revised settlement—\$55,000,000 excluding unquantified equitable benefits including the cap on premium increases and common pooling—was "well within the reas-

<sup>9</sup> The court rejected the objectors' contentions—renewed in this Court, *see* Pet. Br. 8 n.7—that the case had already been settled at the time the class was certified. Pet. App. 33a. The court noted that it had closely supervised negotiations after certification and that the "negotiations were conducted at arms-length, without collusion, and were the result of hard and intense bargaining by able counsel on both sides," Pet. App. 34a. *See also id.* at 36a.

onable range of recovery for this action, even if one were to disregard the substantial risks of this litigation." Pet. App. 65a.<sup>10</sup> It further found that "both the expense and likely duration of the litigation (but for the settlement) would be great." Pet. App. 66a.

Turning to the objectors, the court observed that opposition to the settlement was "not substantial when compared to the size of the class," Pet. App. 67a, and stated that no "class member has provided a sound, objective reason for denying approval of the settlement, nor suggested any other reasonable form of settlement which would adequately address the interests of all class members." Pet. App. 68a. The court acknowledged that some class members complained about having to continue to do business with Liberty National to benefit from the settlement, but found that the reformation of the policies to give class members all the benefits offered under *both* old *and* new policies was "an overall benefit which is in the best interests of the class as a whole and must prevail over the individual concerns of a few objectors." Pet. App. 69a. The court noted that the "'best of both worlds'" coverage afforded class members under the re-

<sup>10</sup> The court acknowledged the *possibility* of an award worth more than \$100,000.00, Pet. App. 63a, but found that the odds of such a recovery were remote. The court observed that plaintiffs would have to overcome many substantial factual and legal arguments to prevail at trial, including uncertainty over "whether the clear written disclosures on the face of the policies and sales brochures preclude any claim of fraud or nondisclosure," Pet. App. 59a, and evidence put on by Liberty National that the benefits provided under the "new" policies are considerably more valuable in the aggregate than the benefits provided under the old policies, so that the great majority of cancer sufferers would actually receive more benefits under the new policy than the old. See Pet. App. 61a-62a. Nevertheless, "for the purposes of deciding the fairness of the Settlement," the trial court "assumed that Liberty National engaged in a company-wide pattern or practice of fraudulent nondisclosure and misrepresentation . . . designed to induce exchanges of cancer policies by healthy insureds by any means possible." Pet. App. 31a.

formed policies was not "generally available for purchase in the marketplace." Pet. App. 69a. Finding that Liberty National's statutory net worth was \$327,000,000, the court stated that "[w]ith some 400,000 named insureds (plus their additional insured family members) in the class, even an award of \$1,000 each would far exceed Liberty National's statutory net worth," and that a "succession of large individual punitive damage judgments" would deplete the company's resources even more rapidly. Pet. App. 72a.

Finally, the court reaffirmed that the action was appropriate for mandatory class treatment under Rules 23(b)(1) and (2). Pet. App. 76a-77a, 83a-84a. It emphasized the danger that, if a right to opt out were permitted, there would be a "race to the courthouse by those permitted to opt-out in an effort to obtain for themselves alone the entirety of the constitutionally permissible punitive recovery in one or a few individual actions." Pet. App. 77a.<sup>11</sup> This scenario, the court concluded, posed "a substantial threat to the interests of the class as a whole if the merit of the claims is what plaintiff and the objectors contend, in that there is the potential for complete destruction [of] all chances of punitive or other recovery to the remaining class members, as well as a potential for loss of all insurance coverage any class members may have with Liberty National." Pet. App. 86a.

**Alabama Supreme Court Review.** About 400 of the class members who had intervened before the trial court appealed the certification of the class and approval of the settlement to the Alabama Supreme Court, arguing that the mandatory nature of the class deprived them of their

<sup>11</sup> In view of petitioners' goal of obtaining punitive damage awards that would very likely prevent a substantial classwide remedy, it is ironic that petitioners felt free to place before the Court extra-record newspaper articles (Pet. App. 122a-35a) in an attempt to besmirch the reputation of class counsel and the trial court by associating them with "ridiculously high punitive damage awards." Pet. App. 133a.



right to jury trial under the Alabama constitution; that the settlement was inadequate and the trial court had made factual errors in the course of approving it; and that the trial court had committed various errors by limiting the discovery provided to the objectors. The Alabama Supreme Court affirmed.

The court ruled that the trial court had properly certified the class under Rule 23(b)(1) and 23(b)(2), holding that "[s]o long as the relief sought is *primarily* equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper." Pet. App. 12a. It rejected the claim that the settlement denied the right to a jury trial, reasoning that the presence of the class representative in a duly certified class action ensures unnamed class members their "day in court." Pet. App. 14a. Because it concluded that the trial court had properly declined to allow a right to "opt out," the Alabama Supreme Court found it unnecessary to decide whether the class would be "more appropriately certified under Rule 23(b)(1) or 23(b)(2)." Pet. App. 15a.

In response to the appellants' claim that the settlement agreement was inadequate because it failed to provide the class sufficient compensation for the higher premiums they paid for the new policies, the court noted that "the new policies contained benefits that were not part of the old policies, and the settlement adequately remedies the problem by requiring Liberty National to reform the new policies to include the benefits that had been provided in the old policies." Pet. App. 15a-16a. The court upheld the trial court's findings and conclusions in support of the settlement, and rejected the objectors' challenges to the trial court's discovery rulings. Pet. App. 17a-19a.

#### SUMMARY OF ARGUMENT

Petitioners, asserting that the predominant issue in this case was their right to damages based on Liberty National's fraudulent conduct, ask this Court to rule that due

process required that they receive an opportunity to opt out. Petitioners contend that the Fourteenth Amendment required the Alabama courts to allow a small percentage of the class to rush to court, capture the lion's share of the (primarily punitive) damages that could be awarded based on Liberty National's tortious exchange policy, and thereby likely destroy the chance that the rest of the class would ever receive any meaningful relief. That claim, however, is not properly presented in this case and is in any event entirely without merit.

1. Petitioners ~~asked~~ to raise any federal issue in the Alabama Supreme Court. In that court, the basis of their claimed right to opt out was the right to a jury trial guaranteed under the Alabama constitution. In the course of making that argument, they referred briefly to the fact that a few objectors were from outside Alabama and argued that those objectors had a due process right to opt out under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). But they plainly avoided making their current argument that the Fourteenth Amendment guarantees a right to opt out for all class members in class actions predominantly involving money damages. The Alabama Supreme Court, in turn, never discussed any federal constitutional issue. It follows that this Court should not reach the merits of petitioners' current constitutional claim. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985).

2. Petitioners' sole claim is that due process guarantees a right to opt out in class actions *predominantly involving damages claims*. They do not question the constitutionality of the rule that mandatory classes should be certified in cases exclusively or predominantly involving injunctive relief. Nor could they: that rule is universally recognized and has strong roots in the practice of equity courts going back many years. *See, e.g., Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 367 (1921). It also makes perfect sense not to allow opt outs in a case where the primary concern is obtaining an



equitable decree to regulate the conduct of the defendant toward a group of people.

The problem is that this case—far from being predominantly a damages case—is a classic example of one where the primary relief properly sought and won for the class was *injunctive*. Although Liberty National's fraudulent conduct was widespread, that conduct had not yet caused substantial injuries to the vast majority of class members. Moreover, even a modest classwide damages remedy would have wiped out the company. The only practical way to deal with the problem was to reform Liberty National's cancer policies to restore the lost coverage, while providing restitution and supplemental monetary benefits to those few class members who had contracted cancer and thus felt the effects of that lost coverage. This simply could not have been achieved if petitioners had been left free to pursue large punitive damage verdicts at the expense of the interests of their fellow class members. Thus, even under petitioners' view of the law, it was fully constitutional to certify a mandatory class in this case.

3. Petitioners also do not question the well-accepted proposition that it is proper to certify a mandatory class in a case involving the equitable distribution of a limited fund of money. *See* Fed. R. Civ. P. 23(b)(1)(B). The trial court properly determined that this case fell into that category, reasoning that the entire assets of Liberty National—and the more limited amount of money that could constitutionally be awarded as punishment in this case—both constituted limited funds. Petitioners dispute the validity of this determination. But the very nature of their complaint about the class settlement—focusing on the denial of an opportunity to garner an inequitable share of the punitive damages potentially available to class members—demonstrates that the trial court had a legitimate basis for its decision to certify a mandatory class on a limited-fund theory.

4. In any event, the Due Process Clause does not mandate a right to opt out even in pure damages cases and even where a limited fund rationale is inapplicable.

a. This Court's ruling in *Shutts* does not support petitioners' claim. The Court there held that out-of-state class members must be given a right to opt out as a means of giving their consent to a state court's exercise of jurisdiction over them. 472 U.S. at 812. *Shutts* did not hold that procedural fairness demands a right to opt out for all class members in damages cases, and the court below plainly had jurisdiction over petitioners.

b. History also fails to support the claimed right to opt out of class actions seeking damages. While class actions were unknown at common law, equity courts frequently adjudicated class actions where the relief at stake was monetary. *See, e.g., Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854). While these tended to be cases involving what are now called limited funds or involving equitable as well as legal relief, the fact remains that courts have long recognized the propriety of mandatory classwide adjudication of individual monetary claims, where there are common questions to resolve and adequate representation is provided.

c. Petitioners' claim also finds no support in the test for assessing procedural fairness set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In a class action, adequate representation is guaranteed, both by ongoing judicial supervision and by class members' right to demonstrate inadequate representation in a subsequent case raising the same claim. *See Hansberry v. Lee*, 311 U.S. 32 (1940). What petitioners are really seeking, therefore, is not a fairer process but a peremptory right of control over the choice of forum and over their legal representative. But once a fair process is provided, the interest in control deserves only modest weight in the due process balance.

Arrayed against that interest are the interests of other class members, the defendant, and the state in achieving an equitable and comprehensive resolution of a class of similar claims in a single forum. As this case illustrates, allowing individuals to opt out and pursue damages separately can deter settlements and often leave little, if any, relief that can be awarded to the class as a whole. As a result, the courts may be burdened with a multitude of individual cases, rather than a single proceeding. At a time when many potential methods of resolving classes of similar claims are under discussion, it would be highly unfortunate if the Court were to hold that one potentially useful mechanism, the mandatory class, is constitutionally forbidden.

#### ARGUMENT

##### I. THE QUESTION PRESENTED IS NOT PROPERLY BEFORE THE COURT BECAUSE IT WAS NEITHER PRESSED NOR PASSED UPON IN THE ALABAMA SUPREME COURT.

The constitutional issue presented here is not properly before this Court. By "longstanding rule," this Court generally declines to consider claims that were not pressed or passed upon in the state court whose judgment is under review. See *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). Here, petitioners presented *no* federal claim in the Alabama Supreme Court. They argued there (1) that the settlement of this mandatory class action violated their right to *jury trial* under *state law*; (2) that the settlement was not fair to class members; and (3) that the trial court made various discovery errors.<sup>12</sup> In the course of making the first argument, petitioners briefly invoked *Phillips*

<sup>12</sup> These were the three issues listed in the "Issues Presented" section of the Brief of Appellants in the Alabama Supreme Court. Brief and Argument of Appellants at xxxiii. Under state law, this section limits the scope of the issues before the court. See *Eady v. Stewart Dredging & Const. Co.*, 463 So. 2d 156, 157 (Ala. 1985).

*Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)—which they described as conferring on "non-resident[s]" of the forum state a right to opt out of a damages action. Brief and Argument of Appellants at 23, 24. However, they emphatically did not assert their *current* due process claim—that persons have a right to "opt out" of class actions seeking damages when personal jurisdiction is uncontested.

This Court has affirmed that a "vague appeal to constitutional principles does not preserve [petitioners'] . . . due process claims." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). *A fortiori*, references to rights under *state law*, or citations to cases dealing with federal questions to support arguments under *state law*, are wholly insufficient to preserve a claim under the Federal Constitution. See *id.* at 77-78 (citing *Webb v. Webb*, 451 U.S. 493, 496-98, 501-03 (1981)).<sup>13</sup>

Nor is this a case in which the lower court *sua sponte* addressed an issue that otherwise would have been forfeited. Cf. *United States v. Williams*, 504 U.S. 36, 41-42 (1992). The Alabama Supreme Court's opinion never so much as mentioned any federal issue. The *only* "constitutional" issue it addressed was appellants' claim that the settlement violated their state jury trial rights. See Pet. App. 13a-15a.

Respondent Robertson acknowledges that this problem was not raised in his brief in opposition to the petition for certiorari.<sup>14</sup> But before finding that this failure constituted a waiver, see *Oklahoma City v. Tuttle*, 471

<sup>13</sup> Out of an abundance of caution, respondents did discuss the due process issues in their own briefs. But surely a state-court appellee's unprovoked argument—ignored by the state court—that a federal right is *not* violated is inadequate to preserve a claim by the appellant based on that right.

<sup>14</sup> The other respondent, Liberty National, did not file a brief in opposition.



U.S. 808, 815-16 (1985), the Court would need to address the unresolved question whether a failure to preserve an issue in a case coming from a state court limits the jurisdiction of this Court. See *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Bankers Life*, 486 U.S. at 79. In any event, even if the rule requiring preservation of claims is prudential only, there are good reasons to apply it here, despite respondents' failure to raise it at the petition stage.

The due process issue presented here is of potentially great and far-reaching import. "Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on [the Court's] discretion." *Gates*, 462 U.S. at 224. Doing so "discourages the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Ibid.* See also *Bankers Life*, 486 U.S. at 79. These "weighty prudential considerations," *Gates*, 462 U.S. at 224, far outweigh any inconvenience involved in dismissing the writ of certiorari and awaiting the next opportunity to address the question presented.

The pressed or passed upon rule also embodies a "'due regard for the appropriate relationship of this Court to state courts.'" *Id.* at 221 (citation omitted). Federalism concerns are particularly acute here: had petitioners properly raised their due process challenge in the Alabama Supreme Court, that court would have had an opportunity to address an issue that distinctively implicates the interaction of the federal Constitution with state procedural rules. Thus, even if the Court has jurisdiction to reach the merits, prudence calls for dismissal of the writ.

**II. EVEN ASSUMING THAT DUE PROCESS REQUIRES A RIGHT TO OPT OUT IN SOME CASES, IT WAS CONSTITUTIONAL TO CERTIFY A MANDATORY CLASS IN THIS CASE, WHERE CLASS-WIDE INJUNCTIVE RELIEF WAS THE PREDOMINANT FORM OF RELIEF AT STAKE.**

Petitioners, in their brief, limit their claim of a constitutional right to opt out to cases in which the *predominant* or *exclusive* form of relief at issue is money damages. See Brief for the Petitioners ("Pet. Br.") i (question presented is whether right to opt out is constitutionally required "when the claims extinguished by the settlement are predominately, if not exclusively, monetary damages claims").<sup>15</sup> They do not claim that opt outs must be permitted where classwide injunctive relief is all that is at issue—or is the predominant remedy sought by plaintiffs who also are pursuing ancillary monetary relief.<sup>16</sup> Petitioners' decision to focus on damages actions is hardly surprising: there is no basis in law, history or common sense for the proposition that due process requires an opportunity to opt out in cases that are exclusively or predominantly injunctive in nature. But that decision means that petitioners are presenting an argument that bears little relation to *this* case. By its very nature, this was a case where the class representative, in order to maximize the interests of the class as a whole, had to give top priority to obtaining *injunctive* relief to restore

<sup>15</sup> See also Pet. Br. 20 ("Shutts established that, in order to bind any class member with respect to claims 'wholly or predominately' for money damages, due process requires that all absent class members be afforded the right to opt out."); *id.* at 35 ("The historical development of class actions demonstrates that the right to opt out is constitutionally mandated in a case involving claims 'wholly or predominately' for money damages.").

<sup>16</sup> See Pet. Br. 30 (citing and distinguishing *Califano v. Yamasaki*, 442 U.S. 682 (1979), *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 251 (3d Cir. 1975), and *King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524, 529 (6th Cir. 1986)).



the insurance coverage previously available to the class before substantial injuries were inflicted on most class members.<sup>17</sup> As a practical matter, that relief could only have been obtained in a mandatory class action like the one certified here. Thus, petitioners' constitutional arguments, whatever their merit in the abstract, simply do not apply to the case at hand.<sup>18</sup>

**A. It Has Long Been Recognized That Courts May Certify a Mandatory Class to Adjudicate Claims "Predominantly" for Classwide Injunctive Relief.**

As petitioners implicitly acknowledge, there can be little doubt that it is constitutional for a court to entertain a mandatory "no opt out" class action to adjudicate a claim for classwide equitable relief. Such class actions were long entertained in courts of equity<sup>19</sup> and have been authorized since 1937 under both versions of Fed. R. Civ. P. 23.<sup>20</sup> This principle is based on the common sense

<sup>17</sup> A very small percentage of the class (fewer than seven hundred insureds of the 400,000 policyholders, Pet. App. 13a) had already contracted cancer, had claims denied, and experienced potentially significant injuries. For those persons, class counsel appropriately sought and obtained full restitution and substantial monetary relief. See J.A. 144-45, 149-50, 398-99.

<sup>18</sup> The irrelevance of petitioners' "Question Presented" to this case provides an additional reason to dismiss the writ.

<sup>19</sup> See, e.g., *Stearns Coal & Lumber Co. v. Van Winkle*, 221 F. 590, 596 (6th Cir. 1915); *Penny v. Central Coal & Coke Co.*, 138 F. 769, 773 (8th Cir. 1905); *Gorley v. City of Louisville*, 65 S.W. 844 (Ky. 1901); *Smith v. Smith*, 18 N.E. 595 (Mass. 1888); *New York & New Haven R.R. v. Schuyler*, 17 N.Y. 592, 603-09 (1858); *How v. Tenants of Bromsgrove*, 1 Vern. 22, 23 Eng. Rep. 277 (Ch. 1681); *Brown v. Vermuden*, 1 Ch. Cas. 272 (1676). See generally 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.09, at 1-22 (1992); Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).

<sup>20</sup> The original Rule 23 did not expressly address the extent to which class actions of any kind would be binding on unnamed class members, but the equitable judgments rendered under the Rule were

notion that, in some circumstances, wrongs inflicted on a group can best be remedied by a generally applicable equitable decree. See Fed. R. Civ. P. 23(b)(2). Often, as here, there is an additional concern that multiple adjudications of equitable claims can lead to *inconsistent* decrees. See Fed. R. Civ. P. 23(b)(1)(A); J.A. 395.

A good example, parallel in many ways to this case, is the class decree in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). There, a fraternal benefit association that sold death benefits to its members had been sued in federal court by a class of members alleging that the association had created a new, less attractive type of benefit certificate and had "wrongfully . . . inaugurated a campaign to persuade and induce the members of the society" to convert to the new type. *Id.* at 359. The class suit was an equitable action seeking an injunction. *Id.* at 360-61. After the class action was concluded, a group of class members sought to relitigate the same claims. This Court held that it was proper for the federal court to enjoin the new suit, reasoning:

It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization, and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. *If the decree is to be*

almost uniformly held to be binding on the entire class. See 1966 Amendments to Rule 23 Advisory Committee Notes (stating that under 1937 Rule, "judgments in 'true' and 'hybrid' class actions would extend to the class (although in somewhat different ways)"); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 930 (1958). The current version, of course, provides that a right to opt out need only be provided in cases certified under Rule 23(b)(3) (typically damages cases) and not in injunctive cases certified under Rule 23(b)(1) or (2). See Fed. R. Civ. P. 23(c)(2).

*effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree.*

*Id.* at 367 (emphasis added).

It is equally well established that allowing opt outs is not necessary in cases where the "predominant" form of relief at stake is a classwide injunction but there are also ancillary claims seeking individual monetary relief. See 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1775, at 466 n.24 (1986) (citing cases); *id.* at 470 (actions including claims for injunctive relief "usually" should proceed under Rule 23(b)(2), with other aspects of the case being treated as "incidental"); Pet. App. 12a (citing *First Ala. Bank of Mont. v. Martin*, 425 So. 2d 415 (Ala. 1982) and federal cases); *Newberg on Class Actions* § 4.14 (citing cases). "The lower courts have consistently held that the presence of monetary damage claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2)." *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1363 (1994) (O'Connor, J., dissenting from dismissal of writ of certiorari, joined by Rehnquist, J., and Kennedy, J.) (citing Wright & Miller).<sup>21</sup>

This was the approach often taken in courts of equity, where the basic trend in the law was to adjudicate both equitable and damages claims in representative suits properly before the equity court:

The older cases granted only the injunction and held that the claims for damages by or against numerous

<sup>21</sup> "If the court determines that both [Fed. R. Civ. P. 23(b)(2) and (3)] apply, then it should treat the suit as having been brought under Rule 23(b)(2) so that all the class members will be bound. To hold otherwise would allow the members to utilize the opting out provision in subdivision (c)(2), which in some cases would thwart the objectives of representative suits under Rule 23(b)(2)." Wright & Miller, *supra*, § 1775, at 491-92 (1986) (footnotes omitted) (citing cases).

persons must be tried in separate actions at law . . . . Recent decisions . . . show an inclination to assess compensation in the unified proceeding, applying the principle that equity once having taken jurisdiction will wind up the whole controversy.

Zechariah Chafee, Jr., *Bills of Peace With Multiple Parties*, 45 Harv. L. Rev. 1297, 1329 (1932) (footnote omitted).<sup>22</sup>

The "predominance" test was also recognized in 1966 by the Advisory Committee that rewrote Rule 23. Discussing Rule 23(b)(2), the Committee stated:

This subdivision is intended to reach situations where a party has taken or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole is appropriate. . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.

(Emphasis added.)<sup>23</sup>

<sup>22</sup> See also, e.g., *Stearns Coal & Lumber Co.*, 221 F. at 596 (equity retains jurisdiction in representative suit to allocate to stockholders proceeds from sale of corporate property recovered from defendant); *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, 253 F. 246, 252 (S.D. Fla. 1918) (inclusion of claim for damages would not prevent equity court from deciding representative suit that also sought injunctive relief on common question); *Climax Specialty Co. v. Seneca Button Co.*, 103 N.Y.S. 822, 823-24 (N.Y. Sup. Ct. 1907) (permitting class suit for injunction and damages).

<sup>23</sup> The same rule was implicitly acknowledged by this Court in *Shutts* (albeit in a discussion of the separate question of when an opt out is required before a state court can exercise jurisdiction over out-of-state class members not otherwise within its jurisdiction):

Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or



Such a rule makes perfect sense. In many if not most cases where classwide equitable relief is sought, it would be possible for a class member to assert a claim for damages based on the same transaction or occurrence. But that cannot be enough to defeat certification of an injunctive class. Nor would it be practical in most instances to allow the class representative to pursue injunctive relief while authorizing individual class members to seek damages separately. As this case illustrates, class representatives often need control of all potential claims against the defendant in order to pursue the most effective resolution for the class as a whole. Allowing some class members to pursue damages separately would not only prevent desirable settlements, but also lead to results where the limited assets of a defendant are primarily devoted to meeting the demands of a small percentage of the class of persons equally affected by the wrongful conduct.

**B. This Case Was Properly Treated as One Where the Predominant Form of Relief Was a Classwide Injunction.**

Because of the predominance test, before even reaching the constitutional issue raised by petitioners, the Court would have to determine that petitioners are correct in labeling this as a case where the predominant claim was money damages. But there would be no basis for such a determination. The trial judge, whose rulings amply demonstrate his thorough familiarity with the case, properly found that "injunctive and other equitable relief is the predominant relief justified under the circumstances." Pet. App. 84a. See Newberg, *supra*, § 4.14, at 4.49 ("predominance" determination "is dependent on the exercise of sound discretion by the court").

*predominately* for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.

472 U.S. 810 n.3 (emphasis added).

Certification of a mandatory "injunctive" class here was fully justified, because, unlike in some consumer fraud cases, the injuries caused by the allegedly fraudulent conduct of Liberty National were largely "prospective" in the sense that they would not be experienced unless and until a policyholder contracted cancer and incurred expenses exceeding the new coverage limits for radiation, chemotherapy and prescription medication.<sup>24</sup> Indeed, it was questionable whether other class members, constituting 99.9 percent of the class, had experienced any out-of-pocket losses whatsoever.<sup>25</sup>

Moreover, a remedy to forestall future injuries had to be injunctive in nature. A monetary recovery alone, without reformation of the cancer policies of Liberty National, would not have allowed a class member to restore unlimited coverage for radiation, chemotherapy and drugs, especially because such a policy was "not generally available for purchase in the marketplace." Pet. App. 69a. The only feasible alternative was to require Liberty National to restore the benefits it had previously agreed to provide while limiting future rate increases.

At the same time, class counsel and the trial court knew that any classwide recovery of *damages* was certain

<sup>24</sup> According to an affidavit filed by a Liberty National benefits administrator, only two of the current petitioners submitted claims under the new policies. Compare J.A. 591-92 (listing objectors who submitted claims under new policies) with Pet. Br. 9a-22a (listing petitioners here). Of these two objectors (Brenda Havard and Norris Woodard), only Havard received less total benefits under the new policy than under the old. See J.A. 593.

<sup>25</sup> All class members who switched to new policies paid somewhat higher premiums. Pet. App. 16a. But to establish a right to damages, they would also have to prove that they failed to receive a commensurate increase in overall insurance coverage. See *Boswell v. Liberty Nat'l Ins. Co.*, 643 So. 2d 580, 582 (Ala. 1994). Evidence developed during discovery showed that, for most insureds, that was not the case. See, e.g., Pet. App. 16a, 61a-62a; J.A. 590-610, 612-19, 654-55, 662-66.



to provide only a small amount of monetary relief to each class member. This was true for several reasons. As already noted, most class members had never contracted cancer and thus had suffered little if any concrete monetary injury. See, e.g., *supra*, nn. 24, 25; Pet. App. 76a, 96a. Moreover, in a particular case, Liberty National could raise substantial defenses based, among other things, on the statute of limitations and on any disclosures about the policy changes that may have been made to that policyholder. Finally, the net worth of the defendant company was \$327 million. Pet. App. 72a. As a result, "[w]ith some 400,000 named insureds (plus their additional insured family members) in the class, even an award of \$1000 each would far exceed Liberty National's statutory net worth." *Id.*

These realities are reflected in the class settlement. The relief sought and won for the vast majority of the class—those who did not contract cancer prior to the settlement—was injunctive and collective. It restored all coverage previously provided in the "old" policies without eliminating any of the other benefits provided in the new policies. In addition, as ultimately approved, the settlement included a temporary freeze on premiums (despite the addition of more coverage), a requirement of common pooling for rate-setting purposes designed to minimize pressure for future rate increases, and specific limits on rate increases. Thus, the settlement not only "fixed the problem" but also provided substantial additional financial benefits.

Petitioners argue that, if allowed to opt out, they could have pursued a claim for a small amount of damages resulting from the higher premiums they had paid, plus a substantial "compensatory damages claim for mental anguish and a punitive damages claim." Pet. Br. 18. But this argument hardly serves to show that the *class action* was predominantly a damages case. Before making that determination, one would have to look, not at the relief one class member might have received in a separate

case, but at what was at stake for the class as a whole. No single individual, suing solely on his own behalf, is likely to want or be able to pursue broad injunctive relief. But if injunctive relief predominates in the remedy that would provide the maximum benefit *to the class as a whole*, then surely certification of a mandatory "(b)(2)"-type action is proper.<sup>26</sup> Here, as we have explained, there was a strong classwide interest in rectifying the fraudulent conduct through prospective equitable relief and no prospect of a substantial classwide award of damages.

Certainly it cannot matter that, in the absence of certification of a mandatory class including all forms of relief, some class members might have succeeded in obtaining large punitive damage awards—to the exclusion of, and potentially at the expense of, the class as a whole. No one, first of all, has a *right* to collect punitive damages. See Pet. App. 86a-87a; *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 886 (Ala. 1993). Such relief is a discretionary remedy that may be defeated, for example, if sufficient punishment has been meted out in other cases brought by other plaintiffs against the same defendant. See *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222-23 (Ala. 1986). Moreover, here, such relief would necessarily have been limited to a small percentage of policyholders who succeeded in the "race to the courthouse," Pet. App. 77a—both because of the finite assets of the company and because of the constitutional limits on repeated punishment for a single course of conduct. See Pet. App. 65a-66a, 68a; J.A. 395-96. At the same time, allowing a few individuals to pursue large punitive awards would have directly harmed the interests of the class by (1) deterring Liberty National from entering into an appropriate, primarily injunctive settlement, and (2) exposing the company to financial ruin that might have destroyed

<sup>26</sup> See generally 3B James W. Moore, *Moore's Federal Practice*, ¶ 23-40[4], at 23-278-23-281 (1996); Wright & Miller, *supra*, § 1775, at 463-70.

its ability to provide coverage *at all* for the bulk of the class. See Pet. App. 76a-77a.

It follows that the Due Process Clause must be interpreted as permitting state courts to determine that classwide injunctive relief is the "predominant" remedy available to and needed by the class as a whole, and to empower class counsel to negotiate or litigate to achieve the best overall package of equitable and damages relief for the class. To hold otherwise would be to decree that the interests of a small minority of class members with tenuous monetary claims stand as an obstacle to the achievement of the best possible result for the class as a whole. The trial court's finding of "predominance" in this case was unimpeachable.

### III. DUE PROCESS PERMITS A STATE COURT TO CERTIFY A MANDATORY CLASS TO ASSURE THE EQUITABLE DISTRIBUTION OF POTENTIAL PUNITIVE RELIEF.

The trial court, in addition to relying on the predominantly injunctive nature of this case, certified a mandatory class based on a determination that the assets that could be pursued in individual lawsuits constitute a "limited fund." It reasoned (1) that the \$327 million net worth of Liberty National could easily be depleted in individual lawsuits and (2) that the total constitutionally permissible level of punitive damages for Liberty National's fraudulent course of conduct constituted a potentially *more* limited fund likely to be used up after only a few of the class members had obtained individual judgments. See J.A. 395-96 (February 4, 1994 order on class certification). These rationales also provided a constitutionally valid basis for denying a right to opt out in this case—again even assuming that such a constitutional right exists in appropriate circumstances.

Both the federal and the Alabama versions of Rule 23(b)(1)(B) authorize mandatory class actions in situations where individual adjudications "would as a prac-

tical matter be dispositive of the interests of [other class members] or substantially impair or impede their ability to protect their interests." A case involving a finite pot of available funds is an "obvious example." Wright & Miller, *supra*, § 1774, at 437 (citing cases). In such a case, of course, there would be little point in certifying a class (and no realistic chance of a class settlement) if individuals could still opt out and pursue individual claims.

Petitioners do not dispute that mandatory class actions are constitutionally permissible in limited fund cases; they instead deny that the assets of a "solvent" company like Liberty National could properly be so viewed. Pet. Br. 38. Whatever the questionable merits of that contention as a proposed rule of federal constitutional law, petitioners completely neglect the very persuasive alternative rationale adopted in the trial court. It is hard to see how the Due Process Clause could be understood to bar a state court from convening a single mandatory proceeding to allow an equitable distribution of the "limited fund" of constitutionally permissible punitive damages for a tortious policy or practice, rather than allowing such damages to go as windfalls to the first few plaintiffs who rushed into court and won favorable judgments.<sup>27</sup> Certainly there could be no clearer example of a case where individual adjudications have the potential to impair the ability of other plaintiffs with identical claims to win a fair share of relief.<sup>28</sup> And

<sup>27</sup> Here, for example, it was hardly equitable for one policyholder who was not even a cancer victim to receive an award of \$1 million in punitive damages. See *McAllister v. Liberty National Life Ins. Co.*, Pet. App. 136a-51a. (Indeed, in *McAllister*, plaintiff's counsel urged the jury to impose a punitive damages award for the benefit of the plaintiff herself and for the "thousands of other Ms. McAllisters" affected by the cancer exchange program, Pet. App. 60a—but did not propose to share the award with those other Ms. McAllisters).

<sup>28</sup> If hundreds of claims attacking Liberty National's cancer policy exchange program had been allowed to go forward as separate actions, Alabama courts and juries would have faced tremen-



states surely have a powerful and legitimate basis for seeking to address this problem through the same kind of mandatory class action that is used to distribute more orthodox "limited funds."

#### IV. THE COURT SHOULD NOT RECOGNIZE A CONSTITUTIONAL RIGHT TO OPT OUT OF CLASS ACTIONS INVOLVING CLAIMS FOR DAMAGES.

Even if the Court were to conclude that the primary relief at stake here was damages and that the case did not in effect involve a limited fund, it still would have no basis for holding that the denial of a right to opt out in this case was a constitutional violation. *First*, this Court has never held, in *Shutts*, 472 U.S. 797, or anywhere else, that the Due Process Clause confers an opt-out right on class members who are subject to the jurisdiction of the court. *Second*, history does not support the notion that there is a fundamental right to litigate damages claims on one's own, rather than in a representative suit. *Third*, there is no reason to conclude that a right to opt out is an essential element of procedural fairness that should be imposed on the states. To the contrary, states should be free to conclude that the substantial public and private costs of a right to opt out in damages cases outweigh any marginal benefits of such a right in terms of enhancing the accuracy of adjudications otherwise appropriate for class treatment.

##### A. Because Petitioners Do Not Deny That the Alabama Courts Had Personal Jurisdiction Over Them, the Court's Holding in *Shutts* Is Irrelevant.

The primary authority cited by petitioners for their claimed constitutional right to opt out is the *Shutts* case.

dous difficulties in assessing appropriate and constitutionally permissible punitive awards. Each court would have needed to take account of the size of the punitive award in every *other* action, a feat that would have been nearly impossible when numerous cases were being litigated at once. Centralizing the punitive damages assessment in a single action had *overwhelming* advantages in terms of judicial administration as well as equity.

This reliance on *Shutts* is entirely misplaced. The issue in *Shutts* was whether the procedures used by a Kansas court were "insufficient to bind class members who were not residents of Kansas or who did not possess 'minimum contacts' with Kansas." 472 U.S. at 802. In the section of the opinion on which petitioners rely, the Court rejected the claim that the Kansas court had "*exceeded its jurisdictional reach*" by proposing to bind out-of-state plaintiffs to a class action damage judgment. 472 U.S. at 806 (emphasis added). The Court concluded that, in the context of "a claim for money damages or similar relief at law," due process requires states to provide an out-of-state class member, in addition to the standard procedural due process rights of adequate notice and representation, "an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* at 812.<sup>29</sup>

Petitioners nonetheless assert that the right to opt out recognized in *Shutts* was not based on concerns about personal jurisdiction after all, but instead on a broader "need to allow class members to exercise individual control over their own claims," Pet. Br. 21, even when class members are subject to the court's jurisdiction. One could reach this conclusion only by ignoring the actual language of the *Shutts* opinion, the context of the court's decision, and the body of law upon which it was based.

Observing that plaintiffs may always consent to jurisdiction in a foreign state's courts, *see* 472 U.S. at 812, the *Shutts* Court characterized the "essential question" before it as "how stringent the requirement for a showing of consent will be" in the context of a class action for damages. *Ibid.* That showing, however, is entirely *unnecessary* when the class member resides in the forum state or has chosen

<sup>29</sup> The Court's qualification that the jurisdictional opt out requirement is "limited" to actions "wholly or predominately for money judgments," 472 U.S. at 811, is a separate reason why *Shutts* cannot help petitioners here. *See supra* Part II.



to litigate there. Petitioners' interpretation of *Shutts* is also flatly incompatible with the Court's references to "the forum State," *id.* at 806, "out-of-state plaintiffs," *id.* at 806, 807, 808, the need for "minimum contacts with Kansas," *id.* at 806, 807, and 808, and "Due Process . . . protections from state-court jurisdiction," *id.* at 812—as well as with the Court's summary statement "that the Kansas court properly asserted *personal jurisdiction* over the *absent plaintiffs* and their claims against petitioner." *Id.* at 815 (emphasis added).<sup>30</sup> If the *Shutts* Court had meant to recognize a new constitutional right to "individual control" of litigation—a right with broad implications for federal as well as state practice, *see infra*, pp. 47-49, it would have given some sign to that effect.

Thus, properly understood, *Shutts* mandates only "that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff." *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992). *See also Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir. 1994); Newberg, *supra*, § 1.15, at 1-41 (*Shutts* determines the level of process that is due "in order for a court to exercise *personal jurisdiction* over *nonresident and absent class members*") (emphasis added).

Petitioners do not argue that any of them was beyond the personal jurisdiction of the Alabama courts, and understandably so. "Almost all" of the objectors are residents of Alabama, Reply Br. of Appellants (Ala. Sup.

<sup>30</sup> Petitioners observe (Pet. Br. 20-21) that the *Shutts* Court recognized that a "chose in action in a constitutionally recognized property interest possessed by each of the plaintiffs." 472 U.S. at 807. But this merely established that the absent class members without "minimum contacts with Kansas," *id.* at 808, were entitled to *some* level of due process protection from the preclusive effect of the Kansas court's class action judgment. The mere presence of a cognizable property interest did not determine *how much* process was due even in *Shutts* itself, let alone here.

Ct.), at vii; as to them, the Alabama courts' exercise of jurisdiction was clearly constitutional. *See Pennoyer v. Neff*, 95 U.S. 714 (1877). Jurisdiction was also proper over those few petitioners who reside outside Alabama. Petitioners *intervened* in the proceedings before the trial court, *see* Brief and Argument of Appellants (Ala. Sup. Ct.), at x, and "submitted timely objections to the class certification, class notice, denial of discovery, issuance of injunction and the settlement." Pet. Br. 13 (citing J.A. 190-245). They participated fully in the fairness hearing, attacking the merits of the settlement and challenging the adequacy of class counsel's representation. In so doing, those few petitioners from outside Alabama consented to personal jurisdiction. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1544 (1996); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995); *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770-71 (3d Cir. 1989). *Shutts* is altogether inapposite here.

**B. History Does Not Support the Proposition That the Right to Prosecute an Individual Action Controlled by One's Own Chosen Representative Is an Essential Procedural Protection in Cases Where Damages Are at Stake.**

History also fails to support petitioners' position. Class suits generally, and mandatory class actions in particular, have a pedigree stretching back hundreds of years.<sup>31</sup> Be-

<sup>31</sup> *See* Wright & Miller, *supra*, § 1751; Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987); Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 518 (1974) (discussing *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676)); Chafee, *Bills of Peace*, *supra*, at 1317-20; William W. Blume, *The 'Common Questions' Principle in the Code Provision of Representative Suits*, 30 Mich. L. Rev. 878, 892-97 (1932). *See also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 195, 203-

cause this traditional procedure has long been viewed as sufficient for adjudicating substantive rights every bit as significant and valuable as petitioners' current claims for "mental anguish and punitive damages," Pet. Br. 18, 23, there is no basis for holding it unconstitutional. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988).

Petitioners contend that our legal traditions recognize a fundamental right to individualized adjudication at least as to legal claims for damages. But, in fact, there are many venerable examples of monetary claims, including damages claims, that were adjudicated by means of a non-opt-out class action. Mandatory class actions "involving monetary claims were adjudicated in equity as a matter of course from early times." Zechariah Chafee, Jr., *Some Problems of Equity* 285 (1950). Well over a hundred years ago this Court ruled—in a case involving monetary claims against a church by secessionist ministers—that

[w]here the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impractical to bring them all before the court. . . . the decree [in a class action] binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

*Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854) (citing J. Story, *Equity Pleadings*). And the fact that these cases were in equity, whereas the law courts maintained more restrictive rules of party practice,<sup>32</sup> is of little moment for purposes of determin-

32 (1992) (surveying the long history of various doctrines of "virtual representation" in English and American law).

<sup>32</sup> Class actions were originally not cognizable at law because of "rigid common law rules discouraging joinder of parties inherited

ing what the principles of *due process* require. The Fourteenth Amendment does not enact common-law joinder rules; nor does it limit equitable procedures to their historic realm.<sup>33</sup>

Petitioners' attempt to distinguish the early class actions resolving monetary claims as "limited fund" cases, Pet. Br. at 36, "seiz[es] upon their accidental limitations rather than their underlying principle of relief." Chafee, *Bills of Peace*, *supra*, at 1320. The Court's approval of the class device in *Smith v. Swormstedt*, for example, rested not on any mechanical classification by type of suit but instead on the Court's determination that class treatment would be both fair (to the absentees) and efficient. See 57 U.S. (16 How.) at 302-03. The same conclusion is warranted here.

It is telling that petitioners do not rely on any authority directly espousing their claimed fundamental right to "individual control" over litigation of damage claims. Instead, they rest on the premise that the opt-out rights under the first two incarnations of the Federal Rule 23 must reflect constitutional minima. See Pet. Br. 35-38.<sup>34</sup>

from England" and because "the procedural machinery of the law courts was not well adapted to protect the rights of unknown, unnamed, or nonparticipating persons." Wright & Miller, *supra*, § 1751, at 11. With the merger of law and equity, however, the "equity class action practice was incorporated into the procedural codes of numerous states," most of which "provided that when the question in dispute involved a common or general interest of many persons or when the group was so numerous that it would be impracticable to bring them all before the court, representatives of the class might sue or defend for the benefit of all." *Id.* (footnotes and citations omitted).

<sup>33</sup> The Seventh Amendment, unlike the Due Process Clause, makes traditional common-law practice its explicit benchmark. But even the Seventh Amendment has not been read to preserve all the technical features of the common law. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979).

<sup>34</sup> Petitioners (Br. at 37 n.16) selectively quote from the 1966 Amendments Advisory Committee Notes to give the impression



Such a premise is unwarranted. The history of the class action, before Rule 23 was adopted and since, shows that personal prosecution of claims has not been viewed as an indispensable ingredient of procedural fairness. That history also shows that the representative suit has evolved and adapted itself to new conditions and new categories of cases. *See, e.g., Wright & Miller, supra*, §§ 1751-53. A constitutional ruling that treated present federal procedural rules as declaratory of the rudiments of fundamental fairness would arrest that evolution, and would be inconsistent with this Court's recognition that the due process is a distinctively flexible concept that readily accommodates changing circumstances. *E.g., Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985); *Mathews*, 424 U.S. at 334; *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring in judgment). As Judge Marvin Frankel wrote in reference to the 1966 Amendment to Federal Rule 23:

There is nothing magic or constitutionally vital about the "true" class action or *in rem* proceedings except that the terms and their implications are matters of old hat for us. Underlying those familiar concepts are familiar notions of necessity or convenience or "practicability" weighed with or against basic principles of fairness. Such notions are flexible and adaptable to the emerging needs of an increasingly complex community. They may be sensibly and justly applied in ways that will make it entirely fair to render judgments "binding" upon absent parties in actions that were formerly . . . non-binding.

that the Committee was of the view that a right to opt out is constitutionally required in damages cases. In fact, the Committee merely pointed to cases generally setting forth the basic requirement of reasonable notice in class actions, and did not suggest that the right to opt out in damages actions was constitutionally required. *See* 1966 Amendment Advisory Committee Notes, Subdivision (d) (2).

Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1967) (footnote omitted).

The long history of representative suits simply does not support the proposition that there is a right of individual control over damages claims, even where those claims would otherwise be suited for adjudication in a class action.

### C. The Balance of Private and Public Interests Affected Does Not Support Recognition of a Right to Opt Out of a Properly Certified Plaintiff Class.

Petitioners are on no firmer ground in arguing that a constitutional right to opt out is mandated by the balancing test set forth in *Mathews*, 424 U.S. 310.<sup>35</sup> A fair application of *Mathews* leads to the opposite conclusion: in view of the other protections for class members built into the class action process—including court certification of the class definition and representatives, court review of any negotiated settlement after notice to all class members, and a due process right to demonstrate inadequate representation in a subsequent lawsuit—a right to opt out simply is not essential to ensure procedural fairness.<sup>36</sup>

<sup>35</sup> The familiar *Mathews* test requires consideration of (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest [by the Government] through the procedures used, and the probable value, if any, of additional or substitute safeguards,"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. In *Connecticut v. Doeber*, 501 U.S. 1, 11 (1991), the Court adjusted this test to fit a dispute among private litigants, holding that in that context the interests of the private party opposing the disputed procedure merit "principal attention."

<sup>36</sup> Petitioners' discussion of the *Mathews* factors rests largely on an (unsuccessful) effort to show that the result in this particular case was unfair. *See* Pet. Br. 22-35. But one cannot make out a



**1. *The Interests of Class Members Opposing Inclusion in a Mandatory Class.***

Because individuals have property interests in state causes of action, due process requires that the procedures followed in adjudicating these causes of action be consistent with fundamental fairness. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). In claiming a right to opt out, however, petitioners are not seeking the basic elements of due process—"notice and an opportunity to be heard," *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 498 (1993); see *Logan*, 455 U.S. at 433-34—protections they received in abundance in this case. Instead, they assert a distinct interest, sounding more in "liberty" than "property," in control over the adjudication of certain legal claims—specifically (1) the ability to choose their own forum and (2) the ability to select and control their own preferred representative.

Neither of these interests merits great weight in the constitutional balance. To the contrary, as long as a state provides a fair process for enforcing a cause of action, it should have great leeway to decide what particular procedural mechanisms—such as an individually prosecuted lawsuit—should or should not be available. "State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765 (1996); the Due Process Clause does not make this Court the "rule-making organ for the promulgation of state rules" of civil procedure any more than it does in the criminal context. See *Medina*

due process claim merely by showing that valid procedures were misapplied in his particular case; as the Court said in *Mathews* itself, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases." 424 U.S. at 344.

*v. California*, 505 U.S. 437, 443-44 (1992) (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)).

As to choice of forum, there are any number of situations—beyond the various kinds of mandatory class actions petitioners must concede are constitutional—in which the law requires that a claim or class of claims be adjudicated at a single time and place. That is the essence of a bankruptcy proceeding. Other examples abound in the rules governing federal civil litigation. See 28 U.S.C. § 1404 (change of venue for convenience of parties and witnesses); *id.* § 1407(a) (multidistrict litigation); Fed. R. Civ. P. 19(a) (compulsory joinder), 22 (interpleader), 42 (consolidation). See generally Judith Resnick, *From "Cases" to "Litigation"*, 54 Law & Contemp. Probs. 5, 26-36 (1991). The plain fact is that due process has never been understood to guarantee a right to select the timing and the forum for adjudication of a claim.

The second interest asserted by petitioners—the interest in choosing and controlling one's legal representative—is perhaps more substantial. But it is far from absolute.<sup>37</sup> This Court has held that the interest in individual selection of counsel can be outweighed by substantial government interests, even when the result was to preclude claimants from proceeding with counsel at all. See *Walters*, 473 U.S. 305.<sup>38</sup> Moreover, the interests in selecting one's own representative and pursuing a civil case *solo*

<sup>37</sup> Many aspects of the litigation process, beginning with the doctrine of *stare decisis*, require a litigant to live with results obtained by others who were not his chosen agents in fora not of his choosing. See *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1349 (1976) ("Once the influence of precedent upon litigation of common questions is considered, the distinction rule 23 draws between (b) (1) and (b) (3) class suits becomes tenuous.").

<sup>38</sup> Members of a mandatory class, of course, are free to obtain their own lawyers for purposes of intervening and contesting adequacy of representation and the other prerequisites for class relief,

deserve the least weight in the class action context, where the adequacy of the representation provided by the court-appointed representative is supervised by the trial court (subject, in Alabama and the federal courts, to appellate review) and can be collaterally attacked in subsequent litigation as well. That is why it is permissible—as petitioners apparently concede—to deny class members a right to select their own representatives in cases involving injunctive claims, which frequently involve rights every bit as important to an individual as any damages claim.<sup>39</sup>

Moreover, many commentators have observed that an individual's practical ability to control litigation of his claim is in reality very limited in the context of the very claims that are subject to class action treatment. See generally Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89, 92-97. As Judge Spencer Williams put it, “[a]lmost everyone who has had contact with plaintiffs of tort litigation at the trial court level would admit that, ultimately, everyone and everything *but* the injured plaintiff controls the litigation.” Spencer Williams, *Mass Tort Class Actions: Going, Going Gone?*, 98 F.R.D. 323, 330 n.23 (1983). “[I]ndividual plaintiffs have weak to nonexistent

as petitioners did here, and in a collateral attack on a class action judgment.

<sup>39</sup> Petitioners have no explanation for why the Constitution should be read to *require* opt-out rights in damages cases, even though mandatory classes are certified as a matter of course in cases seeking equitable relief, including monetary relief such as backpay. See Moore's Federal Practice ¶ 23.40[4], at 279 (citing myriad class actions under Federal Rule 23(b)(2) seeking awards of backpay); Newberg, *supra*, § 4.14. The answer cannot be the risk of inconsistent equitable decrees, since many forms of equitable relief (including backpay) could easily be awarded on an individualized basis. Indeed, because the value of a dollar is roughly the same to different individuals, one might expect to find any fundamental right to “control” in the context of lawsuits seeking relief *other than* money.

control over their attorneys across the mass tort context for reasons that are inherent to the economics of mass tort litigation. Accordingly, proposals for the return to a traditional system of individual case litigation are apt to be as quixotic as they are costly.” John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Column. L. Rev. 1343, 1346 (1995).

As the trial court below recognized, *e.g.*, Pet. App. 68a, the objectors' fundamental quarrel with the class settlement here was that it foreclosed the possibility of large individual punitive damage awards in subsequent actions. Whatever incremental value there may be in individual control of claims for compensatory damages—and given existing protections for unnamed class members, it is slight—that value dissipates completely when the claim is for punitive damages. Especially in the context of a tort affecting hundreds of thousands of victims, no single person has an entitlement to or reasonable expectation of a sizeable punitive award. See Pet. App. 51a. An interest in individualized prosecution of punitive damage claims would amount to an interest in jumping ahead of other plaintiffs to grab an unequal or exclusive share of a bounty collected for the sole purpose of benefiting society at large. Such an interest is entitled to no weight in the due process balance.

## 2. The Incremental Value of the Additional Procedure in Protecting Class Members' Interests.

The Due Process Clause does not mandate procedures for their own sake, but only as necessary to reduce to tolerable levels the risk of erroneous deprivation of a protected interest. See, *e.g.*, *Walters*, 473 U.S. at 327-33.<sup>40</sup>

<sup>40</sup> See *Dixon v. Love*, 431 U.S. 105, 114 (1977) (concluding under *Mathews* that a predeprivation hearing was not required for revocation of traffic license; observing that “a [personal] appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights”



Petitioners, however, make no effort to show that individuals are on balance more likely to attain favorable results as individual plaintiffs than as members of a properly certified class.<sup>41</sup> Instead, petitioners ultimately seek to justify their claimed right to "control" damages litigation, not as a means of protecting their property interests, but as an end in itself.<sup>42</sup>

A right to opt out cannot be seen as an essential for achieving fair and accurate results in civil litigation. Other protections afforded unnamed class members in Alabama are sufficiently comprehensive that little or no incremental protection would be afforded by an across-the-board right to opt out in damages cases. Class action rules such as Alabama's Rule 23 in effect impose on the trial court the duty to substitute its supervision for the individual control that would be exercised in another type of case.<sup>43</sup> Like the federal rule, Alabama's Rule 23

and was "unlikely to have significant value in reducing the number of erroneous deprivations").

<sup>41</sup> Such a showing would be difficult to make. See, e.g., Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan. L. Rev. 815, 815 (1992):

In fact, aggregation adds an important layer of process which, when done well, can produce more precise and reliable outcomes. Paradoxically, the procedural innovation of aggregation provides a quality of justice that surpasses what courts have, until now, been capable of providing in any kind of case.

Empirical findings draw into question the efficacy of non-class litigation at compensating tort victims in a consistent and fair Moore's Federal Practice ¶ 23.40[4], at 279 (citing myriad class manner. E.g., Hensler, *supra*, at 100-04 (surveying research)).

<sup>42</sup> Here, Petitioners' argument reveals its true colors as a disguised version of their *jury trial* argument in the Alabama Supreme Court, where they decried "the destruction of substantive constitutional rights just because the 'correct procedure' may have been followed." Reply Brief at 5 (emphasis added).

<sup>43</sup> See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). As this Court remarked in *Shutts*, "from the plaintiffs' point of view, a

requires the court first to determine that there are "questions of law or fact common to the class," that the representative's own claims are "typical of the claims . . . of the class," and that the representative "will fairly and adequately protect the interests of the class." Ala. R. Civ. P. 23(a)(2), (3), (4). And class members *already* have a right to file their own lawsuit in those instances where they can show that the array of protections for class members has failed and they have been denied adequate representation. *Hansberry v. Lee*, 311 U.S. 32 (1940).

In addition, and of particular relevance here, in the case of a proposed settlement, the court must determine, after adequate notice to the class and opportunity to present objections, that a proposed settlement of a class action is "fair, adequate, and reasonable." See Pet. App. 23a (citations omitted); see also Ala. R. Civ. P. 23(e). Here, the trial court's painstaking review of and extensive modifications to the settlement, coming after objectors had extensive opportunities to participate and object, stand as a model of judicial solicitude for unnamed class members' interests.<sup>44</sup>

Nor can it be contended that claims for damages are somehow inherently unsuited for mandatory class treatment. See Chafee, *Bills of Peace, supra*, at 1329 & n.110 (observing that "often damages can be assessed mechanically") (footnote omitted). When it is possible for the trier of fact to adjudicate liability and to compute damages reliably, there is no reason why due process should preclude a court from entertaining a mandatory class

class action resembles a 'quasi-administrative proceeding, conducted by the judge.'" 472 U.S. at 809 (quoting 3B J. Moore & J. Kennedy, Moore's Federal Practice, ¶ 23.45[4.-5.] (1984)).

<sup>44</sup> Petitioners suggest (Pet. Br. 28 n.14) that if the Court rejects their opt out claim, it should proceed to determine whether they were adequately represented in this case. But that issue was not presented in the petition for certiorari. Moreover, there is no support for petitioners' claims of unfair treatment.



action. By contrast, when substantial differences among plaintiffs' injuries, or other legal or factual asymmetries, make a unitary determination of a claim for damages infeasible, existing law (in Alabama, as under the Federal Rules) already requires the court to take steps to protect class members' individual interests—either by denying class certification entirely, Ala. R. Civ. P. 23(a), by limiting the scope of the class action to genuinely common issues, *id.* 23(c)(4)(A), by creating subclasses, *id.* 23(c)(4)(B), or by establishing individual claims adjudication procedures once common issues have been litigated, *e.g.*, Coffee, *Class Wars*, 95 Colum. L. Rev. at 1439-44.<sup>46</sup>

A constitutional ban on adjudicating damages claims on a mandatory class basis would deprive states of a useful procedural device even in cases where damages are determinable in a single proceeding, without materially improving upon the protections provided by existing law for damage claimants whose claims require individualized determination. Indeed, because petitioners' proposed constitutional rule is based on a peremptory right of the individual plaintiff to "control" his suit for damages, rather than on any practical concern with administrability or proof, it would bar states from certifying a mandatory class for the *liability* phase of an action in which damages are sought, even though the same proceeding could be conducted on a mandatory basis in a case seeking an equitable remedy. Such a rule is not even sensible, let alone compelled by considerations of fundamental fairness.

Provisions allowing individuals to "opt out" of a class are themselves a valuable procedural tool (among other things, as *Shutts* recognizes, the opt-out procedure can be used to obtain consent to jurisdiction from out-of-state class members without minimum contacts). But, contrary

<sup>46</sup> The settlement in this case provides for such an individualized determination of the restitution and supplemental monetary relief due cancer victims. See J.A. 144-50.

to the suggestions of petitioners and their *amici*, a constitutional right to opt out of any class action for damages is scarcely the cure for the problems of unfairness that mandatory class actions, especially class action settlements, can sometimes pose for unnamed plaintiffs.<sup>46</sup> Petitioners, for example, suggest that an opt-out right would be an appropriate means of policing conflicts of interest by class counsel. Pet. Br. 27-28 & n.14. But meaningful enforcement of the existing constitutional requirement of adequate representation, see *Hansberry*, 311 U.S. 32; Ala. R. Civ. P. 23(a)(4), and courts' authority to certify subclasses, Ala. R. Civ. P. 23(c)(4)(B), provide far more direct and effective means of preventing divided loyalties by class counsel.<sup>47</sup> Similarly, existing procedures, notably the requirements of adequate representation and substantive review of settlements, provide courts with ample procedural means of preventing "collusive" settlements (an allegation the trial court here properly rejected, see Pet. App. 34a-36a).

In sum, the opt-out right petitioners seek offers little or nothing that existing mechanisms do not already offer in terms of protecting the interests of absent plaintiffs, and would be a distinctively awkward and costly instrument for attempting to "reform" class action practice.

### 3. *The Interests of Private Parties Opposing the Requested Procedure.*

The interests of plaintiffs who wish to litigate as a class and of defendants seeking protection from duplicative

<sup>46</sup> See, *e.g.*, John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 Corn. L. Rev. 851 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Corn. L. Rev. 1045 (1995).

<sup>47</sup> By contrast, an opt-out rule (available only for damages actions) would scarcely be an effective means of protecting absent class members from attorneys with divided loyalties—class members whose claims are too small to warrant separate adjudications are unlikely to opt out of a suit regardless of whether or not class counsel has a conflict.

lawsuits point decidedly against recognition of a due process right to opt out. These private interests, no less than the private interests of those who seek the opt-out right, merit due weight on the *Mathews* scale. See *Doehr*, 501 U.S. at 11.

Defendants possess a strong interest in avoiding the burdens of numerous, simultaneous lawsuits stemming from a single alleged wrong. The sheer cost of piecemeal litigation is likely to consume a great deal of the defendant's resources; funds that might otherwise be spent on compensating parties are likely to be directed instead to defending individual lawsuits. Indeed, "today transaction costs and legal fees appear to account for more of defendants' total expenditures than do payments to victims." Coffee, *supra*, 95 Colum. L. Rev. at 1441.

Moreover, as this case pointedly illustrates, allowing opt-out rights for individual class members can severely impair the interests of the class as a whole. The trial court found that if individual policyholders were permitted to pursue damage claims on their own behalf, the result would be a punitive damages windfall for a few plaintiffs, coupled with *no recovery whatsoever* for the vast majority of policyholders affected by the defendants' actions (and the prospect that it would not be able to continue to provide coverage). *E.g.*, Pet. App. 77a. It would be strange indeed if the Due Process Clause were interpreted to mandate a procedure almost certain to leave most holders of the protected property interest worse off than they would be without it.

#### 4. *Governmental Interests in Proceeding by Mandatory Class Action.*

As this Court has recognized, *e.g.*, *Gulf Oil Co.*, 452 U.S. at 99; *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979), class action procedures serve substantial governmental interests in the efficient, expeditious, and fair resolution of disputes and in the efficient use of the court

system. Mandatory class actions for damages serve these public interests every bit as much as do mandatory class actions for other kinds of relief. The costs of banning them in every state and federal court in the Nation, as petitioners propose, would be correspondingly high.

It is no secret that "mass" litigation has imposed an enormous strain on crowded federal courts and the often even more crowded state court systems. Class actions generally, and mandatory class actions in particular, are one particularly direct and effective response to this problem. The state's interest in providing meaningful civil justice to litigants whose cases *cannot* be resolved on a consolidated basis weighs heavily against recognition of a constitutional right to "individual control" of jointly triable claims. See Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 Yale L.J. 1643, 1644 (1985) (calling for "a broadened concept of fairness" that "includes fairness not only toward the litigants in an individual case but also to all who use or wish to use the litigation system and to all who are affected by it").

Mandatory class actions, moreover, promote the strong public interest in settlement of legal disputes by reducing the transaction costs of negotiating with multiple parties (here, numbering in the hundreds of thousands).<sup>48</sup> Assured of certain and final resolution of claims against it, a defendant may be willing to pay out more in terms of actual benefits to the plaintiff class than it would be willing to pay if faced with the massive expense of also litigating many individual cases. At a time when docket crowding, fueled in large part by various kinds of "mass" litigation, already threatens state and federal courts' practical ability to resolve civil (and criminal) disputes in a

<sup>48</sup> This Court has recognized that settlement of legal disputes promotes substantial public and private interests. See *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392 (1994); *Marek v. Chesny*, 473 U.S. 1, 10 (1985).



timely fashion, the Court should be extremely hesitant to embrace a new *constitutional* rule that would exacerbate this problem, and foreclose innovative means of redressing it.

Absent a sudden reversal of the long-range economic and social developments driving the movement from "cases" to "litigation," see Resnick, *supra*, even the suggestion of a fundamental, meaningfully enforceable right to "individual control" of jointly triable claims may soon prove wildly unrealistic. Given that a variety of other means exist to ensure that the inevitable evolution toward claim aggregation unfolds consistently with basic fairness, recognizing a constitutional right to opt out would be improvident.

Indeed, one of the most prominent advocates of the interests of unnamed plaintiffs has observed that "[a]ny serious effort at a balanced solution to the mass tort crisis must recognize that federal courts *can no longer afford* every litigant in mass torts case an individual trial." Coffee, *supra*, 95 Colum. L. Rev. at 1439 (emphasis added).<sup>49</sup> Many proposals for reform of existing class action procedures would seek to combine the efficiency of mandatory classes with innovative procedural devices designed to ensure fair treatment of all class members.<sup>50</sup>

<sup>49</sup> Hensler, *supra*, at 89-90 ("[A] consensus has now emerged calling for substantial modification in traditional court processes to improve the efficiency and equity of the mass claims resolution process.").

<sup>50</sup> See, e.g., Coffee, *Class Wars*, 95 Colum. L. Rev. at 1439 (endorsing "limited class actions" with class-wide determination on issues of liability and general causation and individual trials or arbitrations on issues of damages or individual causation); Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 Rev. Litig. 79, 102-03 (1994) (discussing proposed amendments to Rule 23 and proposing new device for resolution of small-scale damage claims without opt-out right); Saks & Blanck, *Justice Improved*, 44 Stan. L. Rev. at 841-50 (endorsing techniques for resolving mass tort claims by averaging results of a subset of "sample" trials); Resnick, *From "Claims" to "Litigation"*, 54 Law

The right petitioners now seek to elevate to constitutional status would rule out such potentially salutary means of reconciling efficiency with equity.

In conclusion, the private and public interest factors identified in *Mathews* and *Doehr* argue overwhelmingly *against* recognition of the broad new rule of constitutional civil procedure petitioners ask this Court to promulgate.

### CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

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& Contemp. Probs. at 39-49 (discussing American Law Institute proposals to facilitate aggregation of claims); David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 851, 908-24 (1984) (discussing various possible mechanisms for resolving mass claims on consolidated basis).



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In The  
**Supreme Court of the United States**

October Term, 1996

GUY E. ADAMS, et al.,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

On Writ Of Certiorari  
To The Supreme Court Of Alabama

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## INTRODUCTION

This action was brought as a claim for money damages based upon the common-law fraud of Respondent Liberty National Life Insurance Company ("Liberty National") and remains a monetary claim at its core. Under both this Court's decision in *Phillips Petroleum v. Shutts* and the balancing test of *Mathews v. Eldridge*, when individual *in personam* claims for money damages are foreclosed in a class action, due process requires that class members be afforded the right to opt out.

Respondents' principal method of evading these clear precedents, and the historical teachings that demand individual control over *in personam* money damages claims, is to mischaracterize this action as declaratory or injunctive in nature. But Respondents do not, and cannot, rebut the essential facts here. The complaint originally asserted claims for *money* damages; the complaints filed outside the class by Class Counsel and others for policyholders who held the same claims sought money damages *only*; and the class action settlement extinguishes class members' substantial money damages claims. See *Liberty National Life Ins. Co. v. McAllister*, 675 So. 2d 1292 (Ala. 1995) (Pet. App. 137a-39a) (compensatory damages of \$1,000). Surely the constitutional right to opt out, and the analogous federal and state Rule 23 procedures, *see, e.g.*, Fed. R. Civ. P. 23(c)(2) and Ala. R. Civ. P. 23(c)(2), cannot be obliterated merely by labeling a settlement foreclosing monetary claims as "injunctive" or "declaratory." *See* Br. of Trial Lawyers for Public Justice at 13.

Respondents also claim that Petitioners have no right to opt out under *Shutts* because Petitioners were not "absent" class members, but rather consented to the jurisdiction of the Alabama court by objecting to the settlement. Petitioners were, of course, "absent" at the key

point in this case – when class counsel negotiated away Petitioners’ opt out rights. A rule limiting the *Shutts* opt out right only to those who enter no appearance at all in the forum state makes no sense because it would require a collateral attack on the settlement before a class member could pursue an individual lawsuit. In any event, Respondents’ argument misreads *Shutts*, which, although it permitted state courts to have a nationwide jurisdictional reach, refused to extend that reach, as a matter of due process, to *any* class member who had not been given, among other things, the right to opt out. 472 U.S. at 810-13.

Finally, Respondents have turned on its head the historical underpinning of the modern damages class action. Mandatory class actions have a long pedigree in Anglo-American jurisprudence, but that does not support Respondents’ efforts to foreclose class members’ claims for money damages here by eviscerating their opt out rights. Class actions for *in personam* money damages were impermissible at common-law, and the only monetary relief accorded on a class basis was *in rem*, where numerous claimants were seeking relief from a limited fund or other fixed *res*. Thus, history teaches that *individual* monetary relief may only be foreclosed by a class judgment where the class members may opt out and pursue their own damages claims. Cf. Fed. R. Civ. P. 23(c)(2) and Advisory Committee Notes thereto.<sup>1</sup>

<sup>1</sup> Respondents assert that this Court lacks jurisdiction because Petitioners did not properly raise their due process claim below, although neither Respondent mentioned this argument at the certiorari stage. Petitioners unquestionably argued both before the trial court and the Alabama Supreme Court that due process requires a right to opt out. Indeed, certain of the Petitioners sought intervention below *solely* to assert opt out rights. (J.A. 93-126). Petitioners’ objections

## ARGUMENT

**A. Under *Shutts* the minimum due process required to bind class members with respect to claims “wholly or predominately” for money damages includes the right to opt out.**

**1. The *Shutts* right to opt out does not hinge solely on consent to personal jurisdiction.**

Respondents’ assertion that *Shutts* was concerned solely with providing out-of-state class members an opportunity to consent to the exercise of personal jurisdiction by a distant court is incorrect. Although there is jurisdictional language in *Shutts*, that part of the Court’s analysis concerned the predicate question: What is the geographical reach of a state court over class members who do not have “minimum contacts” with the forum? The Court held that the potential reach was, in fact, nationwide, but recognized that absent plaintiffs have a separate constitutional interest in controlling their own inherently individual claims. Thus, in delineating the appropriate standards for binding absent class members in money damages cases, the Court held that, “at a minimum,” *all* absent class members must be given notice

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included the failure to afford opt out rights (*see, e.g.*, J.A. 190-245), and they briefed the issue in the trial court (Index to the Clerk’s Record, “Index of Miscellaneous Boxes,” Box #3) and in the Alabama Supreme Court, both in their initial appeal (Pet. Br. to Ala. S. Ct. at 21-25) and on rehearing (Pet. App. for Rehearing at vi, 1-3, 7-12). As Respondent Robertson admits (Rob. Br. at 17 n.13), the due process/opt out issue was raised by Petitioners with sufficient clarity to compel Respondents to address the issue in their own briefs to the Alabama Supreme Court. In light of the presentation of the issue below, the Alabama Supreme Court’s failure to address the opt out issue in terms of due process does not oust this Court of jurisdiction. Robert L. Stern, et al., *Supreme Court Practice*, § 3.17 at 122-23 (7th ed. 1993) and cases cited therein.



and an opportunity to opt out. 472 U.S. at 812. The due process requirement that absent class members be afforded an "opportunity to present their objections" at class proceedings, *id.*, has nothing to do with consenting to the exercise of personal jurisdiction, and everything to do with preserving individual monetary claims. Indeed, as Petitioners noted in their opening brief – and Respondents have not disputed – if lack of contact with the forum state were the *sine qua non* of the minimal due process protections accorded in *Shutts*, then the Court would have stated that the rights of residents of Kansas (the forum state in *Shutts*) could have been disposed of without even those minimal protections.<sup>2</sup>

In addition, the very fact that the holding of *Shutts* was limited to class actions seeking predominately money damages demonstrates that the Court was addressing due process concerns broader than those raised by limitations on personal jurisdiction. *See id.* at 811 n.3. If the Court had been concerned *only* with the exercise of personal jurisdiction over class members lacking contacts with the forum state, there would have been no reason to differentiate between actions for damages and those seeking equitable relief, because, to the extent that a state court lacks personal jurisdiction over a class member, it cannot adjudicate that person's rights no matter what remedy is sought.

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<sup>2</sup> If Respondents were correct that *Shutts* applies only to class members who lack jurisdictional contacts, class members with such contacts might not even be entitled to adequate representation, one of the due process protections set out in *Shutts*. Such a ruling would be at odds with this Court's precedents. *See Hansberry v. Lee*, 311 U.S. 32 (1940); *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996).

## 2. The out-of-state Petitioners did not waive their right to opt out by objecting to the fairness of the settlement.

Even assuming *Shutts*' reasoning were limited to constraints on personal jurisdiction, there are several reasons why Respondents are not correct that the out-of-state Petitioners waived their right to contest the exercise of personal jurisdiction by participating as objectors in the Alabama trial court. First, it is well settled that constitutional rights cannot be lost except through knowing and intelligent waivers. *See, e.g., Edwards v. Arizona*, 451 U.S. 477, 483 (1981); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waiver will not be "lightly presumed," and a court must "indulge every reasonable presumption against waiver." *Id.* at 464. Here, any alleged "waiver" by the out-of-state Petitioners of their objections to the exercise of personal jurisdiction over them in Alabama was anything but "knowing and intelligent." Not only did the class notice fail to apprise those Petitioners that they would lose a constitutional objection by appearing in Alabama, it affirmatively informed them that, *unless they appeared*, they would "be deemed to have waived all such objections and any other objections relating to the subject matter of the litigation of the Settlement, and . . . be barred forever from raising such objections or relitigating [their] individual claims in this or any other action or proceeding." (J.A. 300-02).

Second, Respondents' position requires out-of-state litigants to rely entirely upon collateral attacks to protect their rights even in cases such as this one, where an anti-suit injunction entered by the Alabama court subjects them to contempt of court for filing suit against Liberty National in another forum. In any event, out-of-state Petitioners would be forced to make the Hobson's choice between asserting *only* their right to opt out by collateral



attack, or waiving that right and challenging *only* the merits of the settlement in a distant forum. Respondents do not, and cannot, justify a rule that would encourage the filing of collateral attacks rather than encourage the resolution of all issues – including whether a right to opt out exists – in one proceeding.<sup>3</sup>

Third, any claim that nonresident petitioners waived their right to opt out is at odds with modern civil practice, exemplified both by Federal Rule of Civil Procedure 12(b)(2) and its Alabama counterpart, which permits a party to challenge personal jurisdiction at the outset of the case and also to participate fully in all aspects of the merits of the litigation if the challenge to personal jurisdiction is rebuffed, without waiving the personal jurisdiction challenge. See 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1351 at 261 (2d ed. 1990). Similarly here, Petitioners sought the right to opt out in order to pursue their own litigation, but alternatively challenged the settlement on its merits. In short, any rejection of Petitioners' constitutional right to opt out predicated on the need for a "special appearance" to challenge jurisdiction is contrary to modern practice. See *id.* § 1362 at 450-51.

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<sup>3</sup> The absurdity and unfairness of such a result is highlighted by the current split in the federal circuit courts of appeal regarding the necessity that absent objecting class members must have intervened in the trial court in order to have standing to appeal from a judgment approving a class settlement. Compare, e.g., *Carlough v. Amchem Products*, 5 F.3d 707 (3rd Cir. 1993) (intervention not required) with, e.g., *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987) (class member who was not named plaintiff did not have standing to appeal final judgment). Respondents' suggested rule would prevent distant class members even from seeking the limited relief of moving for the right to opt out in the forum in which the class action is pending.

Finally, the appearance of the nonresidents, like that of all Petitioners, to seek the right to opt out, reflected anything but consent to the lawsuit. Wishing to preserve all objections, as the class notice required, the out-of-state Petitioners also urged various arguments in opposition to the fairness of the settlement, so as not to waive such objections in the event their opt out rights were denied. Thus, it is sophistry to argue that Petitioners were not "absent" class members under *Shutts*. In stark contrast to the Class Representative, they were "absent" from the case at the most critical point – when the settlement crushing their opt out rights was negotiated.

**3. The class settlement "seeks to bind known plaintiffs concerning claims wholly or predominately for money judgments."**

Respondents' argument that *Shutts* is inapplicable because this action is one primarily seeking equitable or injunctive relief flies in the face of (1) the monetary nature of class members' fraud claims, (2) class members' undisputed out-of-pocket monetary losses and compensatory damages, (3) the Class Representative's own initial claim for money damages in both his complaint and motion for class certification and (4) the monetary damages sought by policyholders in cases outside the class, including cases filed by Class Counsel. Ignoring or misstating the facts regarding class members' claims for monetary damages, Respondents hide behind the equitable relief they manufactured and the state courts' perfunctory approval of that relief to circumvent the due process requirement of an opt out in actions seeking predominately monetary damages.

Respondents would have this Court believe that only class members who had cancer sustained damages, although all 400,000 members of the class have fraud

claims for money damages.<sup>4</sup> Moreover, all 206,000 class members like Petitioners whose cancer policies were exchanged (Tr. 494) have undisputed out-of-pocket losses due to payment of premiums for the new policies.<sup>5</sup> The testimony of Robertson and Class Counsel confirming these out-of-pocket losses belies Robertson's contention that these out-of-pocket losses are "questionable" and "prospective". (Rob. Br. at 25). Respondents totally ignore Petitioners' substantial claims for mental anguish.<sup>6</sup> Class members who had cancer and made claims under their

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<sup>4</sup> In Alabama, a fraud plaintiff may either rescind the transaction and sue for a refund of money spent, or affirm the contract and sue for damages. *Glass v. Cook*, 257 Ala. 141, 56 So. 2d 505 (1952); *Kennedy v. Collins*, 25 Ala. 503, 35 So. 2d 92 (1949); *Day v. Broyles*, 222 Ala. 508, 133 So. 269 (1931).

<sup>5</sup> Respondents falsely assert that, in order to recover claims for inflated premiums, class members must show that they received less total coverage under the new policies. (L.N. Br. at 31; Rob. Br. at 25 n.25). Respondents do not contest that Liberty National fraudulently switched policyholders into higher age bands which further inflated premiums. (Pet. Br. at 4 n.3) This aspect of class members' damages, which the state courts completely ignored, has nothing to do with whether the new policies had "better" coverage. Moreover, the Alabama Supreme Court has held that the payment of premiums for the new cancer policies under these circumstances was damage. 675 So.2d at 1298 (Pet. App. 147a). The undisputed evidence established the significance of the out-of-pocket losses for premiums - between 1987 and 1993 alone, the inflated premiums paid on a single policy totaled over \$500 when the policyholder was only four years older at the time the policy was exchanged. (J.A. 545-46).

<sup>6</sup> See *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897, 906-08 (Ala. 1995) (upholding very substantial compensatory awards for mental anguish in fraud action).

new policies have additional compensatory damage claims.<sup>7</sup>

Since Respondents cannot rely upon the facts to support their position, they urge this Court to defer to the findings of the Alabama courts that the case was primarily injunctive and that the claims for premiums were de minimis. After *Shutts*, the question of whether an action primarily concerns "money damages" obviously cannot be left to the unbridled discretion of state courts, which have an interest in approving settlements that will clear numerous claims from their dockets. Moreover, this Court is not required to take the findings of a state court at face value where the undisputed evidence is to the contrary, and particularly where, as here, (1) the record reflects that the case was settled before certification (Pet. Br. at 8-9 n.7), (2) the class was certified without opposition by the defendant (*id.*), (3) the record points to inadequate representation (*see id.* at 28 n.14), and (4) Class Counsel is known to enjoy a special standing in the chosen forum, *see* Br. Attorney General of Alabama at 11.

Robertson's effort to bolster the state court's approval of equitable relief on the ground that a classwide damages remedy would bankrupt Liberty National is without any support in the record. Similarly, Respondents' contention that class members' claims for punitive damages can be asserted only at the expense of

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<sup>7</sup> Robertson's statement that only two of the current Petitioners had cancer and submitted claims is incorrect. The affidavit cited is only a summary of the claims which Liberty National had analyzed as of the fairness hearing (Tr. 590) and does not purport to be a list of all objectors who submitted claims. For example, among the 51 policies issued to the Adams petitioners, claims were made under 9 policies.



other class members is fallacious. As Robertson acknowledges in his brief, Alabama has a procedure to limit punitive damages if the maximum punishment constitutionally permissible has been awarded against the same defendant for the same wrong. (Rob. Br. at 27).

The traditional reasons for maintaining a mandatory class are not present here and the settlement does not afford "appropriate final relief" as Liberty National suggests. (L.N. Br. at 30). Releasing class members' fraud claims for monetary damages in exchange for a reformation of their policies which *requires* them to *continue* to do business with the wrongdoer in order to obtain any relief at all and which further allows the wrongdoer to continue to collect fraudulently inflated premiums is anything but "appropriate".<sup>8</sup>

In all their efforts to mischaracterize this action as "equitable," Respondents have failed to articulate any countervailing interests supporting mandatory class certification here. If, in fact, there were equitable aspects of this case which required a remedy, nothing prevented the settlement from being structured as a mandatory class only as to any such claims for equitable relief but as an opt-out class with respect to the monetary claims.<sup>9</sup>

<sup>8</sup> Furthermore, many state courts have held that common-law fraud claims are not ever appropriate for class certification under their counterparts of Rule 23(b)(3). See, e.g., *Stevens v. Thomas*, 361 S.E.2d 800, 804 (Ga. 1987); *Lance v. Wade*, 457 So.2d 1008 (Fla. 1984). These courts have rejected class certification because of numerous individual issues inherent in such claims, including the degree to which each plaintiff relied on the defendant's misrepresentation, the extent of any economic and non-economic losses caused by the fraud, and the nature of particular representations made to the plaintiffs.

<sup>9</sup> Cf. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (certification

This case exemplifies how defendants such as Liberty National, who are seeking to eliminate numerous damage claims in a single action, with the aid of a friendly plaintiff's attorney, can manipulate and abuse the class action device to the detriment of class members by offering to settle a damages class action on the condition that the settlement be fashioned so that the class purports to be a mandatory class under Rule 23(b)(2). See Br. Trial Lawyers for Public Justice at 13. Liberty National is adept at manipulating the class action procedure; it has utilized mandatory classes to foreclose monetary damage claims arising out of its alleged fraud in the past<sup>10</sup> and obviously hopes to do so in the future.

**B. Under *Mathews v. Eldridge*, Petitioners' individual in personam claims for monetary damages cannot be foreclosed without their consent.**

Application of the *Mathews v. Eldridge* test demonstrates that due process is violated unless the absent members of this class are afforded the right to opt out to

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under (b)(2) limited to injunctive relief to protect opt out with respect to claims for damages); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981) (class members allowed to opt out of (b)(2) class action on ground that, when individual monetary relief is sought, class "begins to resemble a 23(b)(3) action and there has been more concern with protecting the due process rights of the individual class members . . ."); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) (opt out provided in class action certified pursuant to 23(b)(2) when class members had unique claims for monetary damages).

<sup>10</sup> *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499 (N.D. Ala. 1991), *aff'd per curiam*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied sub nom. Taylor v. Liberty National Life Ins. Co.*, 509 U.S. 906 (1993) (mandatory class disposing of fraud claims arising out of burial policies).



pursue their individual money damages claims.<sup>11</sup> Respondents' arguments to the contrary are unavailing.

1. Respondents concede that a chose in action, such as the fraud claim of each class member against Liberty National, is a protected property interest. They then attempt, unsuccessfully, to shift the Court's focus away from class members' *in personam* monetary claims which are foreclosed by the settlement. Liberty National argues that the "manner of deprivation" of Petitioners' property interests does not implicate due process because Petitioners merely were required to submit their claims for adjudication and Petitioners' claims were not randomly "surrendered for [no] value." L.N. Br. at 35. Surely, due process is implicated by a settlement which *extinguishes* class members' *in personam* claims for monetary damages yet provides *no* monetary compensation for their out-of-pocket losses and requires class members to *continue* to pay fraudulently inflated premiums to the wrongdoer in order to obtain any "relief" at all.

The issue is not merely that Petitioners received a lesser amount in settlement than they wanted, but that Respondents imposed a form of relief not sought by Petitioners, nor by Class Counsel initially, in order to foreclose Petitioners' monetary claims. Liberty National's attack on Petitioners' punitive damage claims, in a continuing effort to miscast

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<sup>11</sup> Liberty National's unsupported assertion that this Court should apply the approach used to assess validity of a rule of criminal procedure in *Medina v. California*, 505 U.S. 437 (1992), in civil cases ignores both this Court's express rationale in *Medina* for not applying *Mathews* in the field of criminal law (the Due Process Clause has limited application beyond the constitutional guarantees in the Bill of Rights which are specific to criminal procedure) and this Court's affirmation in *Medina* of the *Mathews* test as "a general approach" for challenging state procedures in non-criminal contexts. 505 U.S. at 444.

Petitioners as "lottery players," similarly fails to diminish Petitioners' property interest in their *in personam* claims for monetary damages, including their out-of-pocket losses for the fraudulently inflated premiums (1) for the new policies and (2) as a result of being shifted into older age bands. (Pet. Br. at 23-24).

Robertson attempts to shift the focus away from Petitioners' individual damage claims by arguing that Petitioners are really claiming a "liberty" interest in control that is limited to "choice of forum" and "choice of representation." (Rob. Br. at 38). While Petitioners do assert those interests, Petitioners' fundamental concern is that, unless individual claimants can present individual proof regarding their damage claims, there is a very high risk of erroneous deprivation of class members' *property rights* in their causes of action, because claims for damages raise inherently individual, heterogeneous issues. The core issue is not simply "control" but also preservation of a property right.

2. With respect to the second *Mathews* factor, Liberty National again relies on the state court findings and the "procedural safeguards" of class actions generally in support of its otherwise untenable position. As Petitioners discussed in their brief (Pet. Br. at 25-31), this case exemplifies how the "procedural safeguards" touted by Liberty National are insufficient to ensure that class members receive due process. Without the right to opt out there are no effective checks<sup>12</sup> on defendants who

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<sup>12</sup> Liberty National's suggestion that the "review" of the settlement by class members is a "check" on erroneous deprivation is ludicrous. (L.N. Br. at 39). Similarly, if Petitioners attempted to collaterally attack adequacy of representation in a separate proceeding (*id.*), Liberty National would vigorously assert the trial court's anti-suit injunction (Pet. App. 101a-02a) and argue waiver. See *Martin v. Drummond Co.*, 663 So.2d 937 (Ala. 1995), *cert. denied*, 116 S.Ct. 1040 (1996).

want to foreclose all damages claims, or friendly class counsel,<sup>13</sup> or courts anxious to dispose of litigation, to prevent the erroneous deprivation of class members' property interests in their individual claims for damages.

Contrary to Robertson's assertion, the evidence overwhelmingly shows that Petitioners are more likely to obtain a favorable result as individual plaintiffs than as members of this class. Reimbursement of Petitioners' out-of-pocket losses alone would be a far more favorable result than the class "relief" which forces Petitioners to continue to pay fraudulently inflated insurance premiums to Liberty National in order to obtain any "relief" at all. Robertson's suggestion that damages in this case can be assessed "mechanically" (Rob. Br. 43-44) is patently untrue. Here there are individual issues with respect to (1) the amount of the fraudulently inflated premiums paid as a result of the shift in age bands, (2) the extent of mental anguish damages suffered by each class member and (3) additional individual issues with respect to class members who had cancer.

Absentees in class actions are guaranteed a series of protections by the Constitution, including notice, adequate representation and the opportunity to opt out, 311 U.S. at 42-3; 472 U.S. at 811-12. Taken together, these rights provide far more protection than any one of them separately. Cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, n.13 (1974) (notice and opt out rights cannot be omitted on the ground that adequate representation is sufficient to protect absentees' rights under Rule 23). The

<sup>13</sup> In its attempt to distance itself from cases in which settlement was reached prior to certification, e.g. *Amchem Products v. Windsor*, 83 F.3d 610 (3d Cir.), cert. granted, 117 S. Ct. 379 (1996), Liberty National ignores the evidence that a settlement in principle was reached prior to certification in this case. (Pet. Br. at 8-9 n.7).

right to opt out of a case foreclosing predominately claims for monetary damages is an essential "check" in this group of protections to ensure that the class representative fairly and adequately protects the class and that the trial court adequately supervises the litigation. Neither Respondent has articulated any interest of the private parties or the state in avoiding opt outs which outweighs the interest in preventing erroneous deprivation of class members' monetary claims.

Liberty National's most specious argument is that allowing an opt out would somehow vitiate the settlement. As noted previously, Alabama has a procedure to address multiple punitive damages awards. The "pernicious" result here is that class members' claims for their out-of-pocket losses and other monetary damages are extinguished and the only way they can obtain any "relief" is to continue to pay fraudulently inflated insurance premiums to the company which defrauded them.

Liberty National's argument that it might be subjected to "incompatible standards of conduct" because of the claims of policyholders who objected to the inequities created in pooling insurance premiums as a result of the exchange programs illustrates the inherent problems in certification of this class. Policyholders like Petitioners, whose policies were exchanged and who incurred out-of-pocket losses, are entitled to seek reimbursement of their monetary damages, as illustrated by the cases filed outside the class, including those filed by class counsel.

Liberty National's argument that, if opt outs are required, no class action would ever be settled is groundless. Both the Federal and Alabama Rules require opt outs in money damages cases certified under Rule 23(b)(3). Thousands of class action cases are settled pursuant to Rule 23(b)(3) with opt out provisions. As Petitioners point out in their brief, few class members opt out of such



cases, which demonstrates the effectiveness of the opt out procedure as a check on the fairness and adequacy of the class representative's representation.

While the government certainly has an interest in efficiently resolving litigation, that interest does not outweigh the risk of erroneous deprivation of class members' property interest in their fraud claims for monetary damages. As this Court in *Shutts* and the drafters of the Federal Rules of Civil Procedure have recognized, in a class action foreclosing claims predominately for money damages, the right to opt out is the most effective safeguard to ensure that class members receive adequate representation and a fair and just result.

**C. The historical development of class actions demonstrates that due process requires a right to opt out in class actions seeking to bind plaintiffs with respect to *in personam* claims for damages.**

Contrary to the repeated suggestions of Respondents, the historical use of the mandatory class action device does *not* support its application in this case. Instead, careful review of the relevant common law precedents, including those relied upon by Respondents, confirms that due process prohibits the classwide elimination of Petitioners' *in personam* damages claims without their consent.

While it is correct that the class action "has deep roots in Anglo-American jurisprudence," L.N. Br. at 43, those roots have never been extended to choke off the due process rights of claimants asserting individual claims for *in personam* damages against a solvent defendant. Rather, to the extent mandatory classes have historically resolved claims for monetary relief, they have done so only in the *in rem* context, where multiple claimants

assert rights against a limited fund. See *Christopher v. Brusselback*, 302 U.S. 500, 504 (1938) (limiting binding effect of class actions to cases "affecting [class members'] interest in property within the jurisdiction of the court"). In this context, a limited fund is "a fixed asset or piece of property . . . in which all class members have a preexisting interest. . . . Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, [and] proceeds of a ship sale in a maritime accident suit." Herbert B. Newberg & Alba Conte, 1 *Newberg on Class Actions* § 4.09 at 4-32-33 (3d ed. 1992). Virtually all of the cases relied on by Respondents and *amici* involved *in rem* claims against a limited fund. See, e.g., *Smith v. Swormstedt*, 57 U.S. 288 (1854) (claims for allocation of church fund); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (declaratory judgment regarding disposition and control of trust funds held by fraternal benefit association).<sup>14</sup>

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<sup>14</sup> The only exception, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is inapposite because the potential, unidentified *in personam* claims released in that proceeding were ancillary to the Court's primary objective of settling claims against a trust. *Id.* at 311-13. In light of the "vital interest of the State in bringing any issues as to its fiduciaries to a final settlement," *id.* at 313, the Court held that it would not construe the Due Process Clause so as to place impossible or impractical obstacles in the way of achieving that state interest, *id.* at 313-14. Thus, even if potential claims against the trustee for "improper management of the common trust fund," *id.* at 311, could be considered "*in personam*," since those claims were derivative of *in rem* claims against the trust itself, they could be extinguished as part of the final settlement of the trust. Here, there is no such "vital interest of the State" requiring the release of class members' claims against Liberty National, and those claims are in no way derivative of *in rem* claims requiring a final accounting.



Professor Chafee, upon whom Respondents and *amici* rely heavily to support use of a mandatory class here, even acknowledges that class actions were historically limited to the *in rem* context:

It is a *cardinal principle* of such class suits that the omitted members must be interested in the subject matter of controversy in the same way as their representatives. If all the members are connected similarly with land or money within the jurisdiction, the court of equity can then consider the property rather than the owners in reaching its decree. . . . On the other hand, *if the enjoined persons have special claims or liabilities, their rights are personal and can not be concluded in their absence.*

Zechariah Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297, 1308 (1932) (emphasis added). Chafee's "cardinal principle" that *absent* parties cannot be bound by the actions of a representative in a class action with respect to their claims for *in personam* damages stands in contrast to his expansive view of the jurisdictional reach of courts of equity to grant "bills of peace." The critical difference stems from the fact that the bill of peace, unlike the class action, did *not* always depend on the principles of virtual or vicarious representation, but in some instances was used merely to assert jurisdiction over multiple claimants while still providing *every individual claimant* notice and an opportunity to present his or her claim as to any individual issues. See Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon*, 54 Ohio St. L. J. 607, 615 (1993).

The historical restriction on the use of mandatory class actions to resolve claims for monetary relief to the *in rem* context is no "accidental limitation," see Rob. Br. at 35, but, like the *Mathews* test, reflects the need to protect

claimants seeking *in personam* damages from erroneous deprivation of their constitutionally protected property interests in their causes of action. With respect to claims asserted against a true limited fund, the underlying substantive rights of each individual claimant are constrained not only by the size of the fund itself, but also by the rights asserted by competing claimants to the same fund. In that instance, each competing claimant is substantively entitled to no more than his or her *pro rata* share of the fund, and adjudication of those rights requires the court to assess all of the claims in one proceeding.<sup>15</sup>

In sharp contrast, however, the substantive rights of plaintiffs asserting *in personam* claims for damages against a defendant that is not in bankruptcy or receivership are wholly unconstrained by the rights of competing claimants. Claims such as Petitioners' are separate and independent, and the interests and issues raised by such claims are heterogenous. Moreover, the tort laws of Alabama and every other state provide that judgments for damages are enforceable *in full* upon becoming final, and competing claimants have no right to assert any claim to a *pro rata* share of such judgments.

Moreover, in this case the trial court certified this action under Alabama Rule 23(b)(1)(B) *after* the settlement fairness hearing, *without* hearing *any* evidence that the claims asserted were substantially likely to exhaust Liberty National's assets, and *without* any notice to class

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<sup>15</sup> If Liberty National were to enter bankruptcy or receivership, the underlying nature of the substantive rights of competing claimants would be altered. See *Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("[t]he Bankruptcy Act . . . converts the creditor's legal claim into an equitable claim to a pro rata share of the res").

members that such certification was even being considered. Such a nonadversarial, standardless, seat-of-the-pants procedure is destined to result in an "erroneous deprivation" through a wrongful conclusion that class members' claims will render Liberty National insolvent.

### CONCLUSION

The holding of The Alabama Supreme Court should be reversed, and Petitioners should be allowed to opt out of the class settlement.

Respectfully submitted,

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ATLA has declared its position regarding class actions in a formal resolution adopted by its Board of Governors on Oct. 5, 1996:

Class actions can be important procedural vehicles utilized by consumers and others to halt and deter wrongful conduct. However, class actions have the potential to affect individual rights, and potentially may interfere with an individual plaintiff's exercise of the right to legal counsel and the right to trial by jury. . . .

ATLA believes . . . that any waiver of the right to a jury trial should be a knowing and informed choice of the plaintiff [and] that plaintiffs are entitled to counsel of their choice whose loyalty is undivided by any conflict of interest. Accordingly, ATLA opposes the implementation of class action procedures unless each claimant is afforded the fullest opportunity to exercise a knowing and intelligent waiver of jury trial and a meaningful opportunity to opt out of the binding effect of such proceedings.

In ATLA's view, the class certification and settlement approved by the Alabama court in this case is an example of the danger that individual rights may be sacrificed in the effort to resolve a large number of claims. Indeed, in order to achieve settlement in this case, the causes of action of objecting plaintiffs were effectively kidnapped and turned into mere administrative claims under the mandatory settlement.

ATLA submits that affording class members the opportunity to opt out of the class as a matter of procedural due process will safeguard the rights of the class members while preserving -- indeed, enhancing -- the effectiveness of the class action as a means of resolving disputes in a just and efficient manner.

## SUMMARY OF THE ARGUMENT

Plaintiffs in this case, as victims of an alleged fraud on the part of Liberty National, possessed an accrued cause of action for money damages against the company. This Court has recognized that a vested cause of action is a species of "property" protected by the Due Process Clause of the Fourteenth Amendment. Access to justice has also been recognized by this Court as implicating a liberty interest protected by the due process guarantee. The fact that the Alabama Constitution itself guarantees open courts and a right to a remedy for those with vested rights requires that plaintiffs not be deprived of their causes of action without due process.

Whether due process requires that plaintiffs seeking monetary damages be afforded the procedural safeguard of the right to opt out of a class action is determined by the balancing of the interests of plaintiffs against any burden on governmental interests.

Plaintiffs' property interest is of great weight and importance because, by extinguishing their cause of action, the Alabama court erased plaintiffs' right to present their claims in a jury trial and their right to counsel of choice. The right to trial by jury in civil cases is deemed so fundamental that it was constitutionally guaranteed by the Seventh Amendment and has been scrupulously guarded against infringement by this Court. Although the Seventh Amendment has not been incorporated into the Fourteenth Amendment, its fundamental importance to the American civil justice system is a measure of the importance of the property interest of which plaintiffs were deprived.

Additionally, class certification deprived plaintiffs of the right to counsel of their choice to pursue their claims. This right includes the right to counsel whose loyalty is undivided by any conflict of interest, unless it is voluntarily waived by the client. This is particularly important in class actions



involving individual claims for money damages, which inherently present potential conflicts among members of the class and a serious possibility of collusion between class counsel and defendant.

A determination that plaintiffs are adequately represented by the class representatives and class counsel is not sufficient to protect plaintiffs' property interest. The rights to trial by jury and counsel of choice are individual rights that serve values of autonomy and fairness separate from the amount of damages obtained. By their very nature, these rights cannot be protected by "representatives" without plaintiffs' consent.

The value of the opt-out as a procedural protection is suggested by Rule 23 itself, which requires that members of a class certified under Rule 23(b)(3) be afforded the opportunity to exclude themselves from the class. This Court has indicated that the right to opt out serves as a means of obtaining consent or waiver by plaintiffs whose due process rights are infringed. A number of courts have recognized the unfairness of denying this choice to plaintiffs with monetary claims. Those courts have held that such plaintiffs should be afforded the right to opt out, either as a matter of due process or as an appropriate exercise of judicial discretion.

Finally, the governmental interest in denying this procedural safeguard to plaintiffs with claims for money damages is slight. Since the right to opt out is mandatory in class actions certified under Rule 23(b)(3), there is no discernible governmental interest in denying opt-out rights to those with monetary claims classified under (b)(1) or (b)(2). Indeed, the possibility that plaintiffs might leave the class advances the government's interest by providing an added incentive for adequate representation and equitable treatment of all members of the class. There is no legitimate governmental interest in prohibiting opt outs in order to prevent large numbers of claims from depleting a defendant's assets. Congress has already provided a means of addressing this issue in the Bankruptcy Act. Defendants should not be

permitted to use a mandatory class action as an "end run" around the Bankruptcy Code, which provides greater protection of tort creditors.

## ARGUMENT

### **I. DENYING MEMBERS OF A CLASS SEEKING MONEY DAMAGES THE OPPORTUNITY TO OPT OUT OF THE CLASS ACTION DEPRIVES THEM OF INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE.**

#### **A. Certification Of The Class Action As A Mandatory Non-Opt-Out Class Extinguished The Individual Causes Of Action Of Plaintiffs.**

Amicus addresses this Court with respect to a single issue in this case: Whether members of a plaintiff class with claims seeking money damages are entitled to an opportunity to opt out of the class action as a matter of due process. Amicus submits that denying such plaintiffs the choice to pursue individual actions effectively extinguished their vested rights in violation of the Due Process Clause of the Fourteenth Amendment.

Plaintiffs in this case are people who bought "cancer insurance" which Liberty National had sold since the 1960's. During 1987-88, in an effort to limit its exposure and reduce payments, defendant persuaded policyholders to switch to a "better" policy that provided added coverage. Allegedly, Liberty National agents failed to tell policyholders that the new policies imposed severe limits on payments for covered treatments. Policyholders found themselves paying higher premiums for lower coverage.

These policyholders clearly had a vested and viable cause of action for damages against Liberty National. Indeed, a number of them brought suit, and the Alabama Supreme Court held their allegations sufficient to state a cause of

action for fraud, regardless of whether the policyholders had actually made a claim under the policy. *Boswell v. Liberty National Life Ins. Co.*, 643 So. 2d 580 (Ala. 1994). It is also clear that plaintiffs were entitled to a jury trial on their claims. In fact, in October 1993, a jury found Liberty National liable for fraud, awarding damages to the policyholder. The Alabama Supreme Court affirmed. *Liberty National Life Ins. Co. v. McAllister*, 675 So. 2d 1292 (Ala. 1995).

At about the same time, a class action was filed in Alabama state court on behalf of all policyholders who had exchanged their policies. Liberty National and class counsel negotiated a settlement of this action. On May 26, 1994, a Circuit Judge issued an Order and Final Judgment which both certified the class and approved the settlement. The Order explicitly prohibited class members from opting out of the class and required class members to release all pending and future claims against the company. Plaintiffs who had objected to the certification appealed.

The Alabama Supreme Court upheld the order. *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995). The Court determined that certification complied with Ala. R. Civ. Pro. 23. That rule is identical to Fed. R. Civ. Pro. 23 and Alabama courts "consider federal case law on class actions to be persuasive authority." 676 So. 2d at 1268. The court found no abuse of discretion by the Circuit Judge in certifying the class under Rule 23(b)(1)(A), (b)(1)(B), or (b)(2) which, like their federal counterparts, do not require that class members be permitted to opt out of the class action.

The court's opinion addressed only the propriety of certifying the class action under Rule 23(b)(2). It noted that the class action complaint included pleas for an injunction against the policy exchange program, restitution of lost benefits, reformation of new policies to eliminate limitations, reinstatement of lapsed policies and other injunctive relief. *Id.* at 1270. The court rejected the objectors' contention that the Circuit Judge should have certified the class under Rule

23(b)(3). "So long as the relief sought is *primarily* equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper." *Id.* at 1271. (emphasis in original)

The result was that over 200,000 policyholders whose policies had been exchanged for worse policies, learned that their individual causes of action had been "exchanged" for membership in a class from which they could not escape. They learned that the class action was settled on terms which gave no money damages to 99.75% of the class.

## **B. An Individual Cause Of Action Is A Form Of Property Protected By The Due Process Clause.**

### *1. Plaintiffs Have a Property Interest in a State-Created Cause of Action*

Plaintiffs' cause of action for fraud, though it arises under state law, is protected by the Due Process Clause. One of this Court's earliest pronouncements declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that this Court has located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

This Court had occasion to reaffirm this right of access to justice in a case where state procedure extinguished a state-created cause of action in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Logan had brought an action under the Illinois Fair Employment Practices Act, alleging that his employer had fired him because of his physical disability. The statute required a determination by the Illinois Fair Employment Practices Commission as to whether there was



substantial evidence of discrimination. When the Commission failed to act within the 120-day period set by the Act, the Illinois Supreme Court held that the time limit was jurisdictional and Logan's cause of action was extinguished.

This Court reversed, holding that Logan was entitled to present the merits of his case. Justice Blackmun wrote:

The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. . . . [T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."

455 U.S. at 429-30, quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

That a plaintiff's cause of action is a protected interest, Justice Blackmun wrote, "was affirmatively settled by the *Mullane* [*v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)] case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." 455 U.S. at 428 (emphasis added). See also *Martinez v. California*, 444 U.S. 277, 281-282 (1980) ("Arguably," a state tort claim is a "species of 'property' protected by the Due Process Clause."). Having created a cause of action, the Court declared, the State "may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." 455 U.S. at 432.

## 2. Plaintiffs' Property Interest Is Guaranteed by Alabama's Constitutional Right to a Remedy.

It was of particular import in *Logan* that under the Illinois statute, "A claimant has more than an abstract desire

or interest in redressing his grievance: his right to redress is guaranteed by the State." 455 U.S. at 431. In this case, the plaintiffs' right to access to a judicial remedy is explicitly guaranteed by the Alabama constitution:

That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Ala. Const., Art. I, sec. 13.

This provision, which traces its origin to the Magna Carta, has been incorporated into the constitutions of 39 states. David Schuman, *The Right to a Remedy*, 65 Temple L. Rev. 1197, 1199-1201 (1992). Some states have applied the provision expansively as a check on legislative limits on common law remedies. See e.g., *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988); *Lucas v. United States*, 757 S.W.2d 686 (Tex. 1988). See generally, David R. Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 Okla. L. Rev. 195 (1985); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615 n.218 (1981).

Even among the states construing this provision narrowly, there is common agreement that "vested rights may not be disturbed." Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202, 1205 (1964). The Alabama Supreme Court has construed Art. I, sec. 13 as protecting "vested rights." *Reed v. Brunson*, 527 So. 2d 102, 114-15 (Ala. 1978).

## C. An Individual Cause of Action is a Liberty Interest Protected by the Due Process Clause.

Viewing the erasure of a plaintiff's cause of action through a different due process lens, it is clear that the



Alabama court's action also implicates a liberty interest under the Fourteenth Amendment.

This Court's decisions striking down state restrictions on providing legal services to potential plaintiffs have recognized that "meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971). Underscoring the importance of this right, the Court has declared that no law can pass constitutional muster if it bars the people "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Brotherhood of Railway Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964).

The vindication of rights that the Court comprehends within this constitutional protection includes the full range of civil wrongs. *Trainmen* involved union assistance to workers injured on the job in obtaining legal representation. The Court acknowledged that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" *United States v. Burke*, 112 S. Ct. 1867, 1871 (1992), quoting *Carey v. Phipps*, 435 U.S. 247, 257 (1978).

Plaintiffs, like Logan, possessed a vested cause of action that was extinguished by the court's certification of the class action as mandatory non-opt-out. Like Logan, plaintiffs are not challenging the court's error, "but the established state procedure that destroys his entitlement without according him proper procedural safeguards." 455 U.S. at 436. Having established that the ruling deprived plaintiffs of an interest protected by the Due Process Clause, Amicus turns to the question of what process is due.

## **II. PROCEDURAL DUE PROCESS DEMANDS THAT CLASS MEMBERS WITH CLAIMS FOR MONETARY DAMAGES BE AFFORDED A MEANINGFUL OPPORTUNITY TO OPT OUT OF THE CLASS.**

Whether due process requires class members to be afforded an opportunity to exit the class is answered by the familiar balancing of interests set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose.

*United States v. James Daniel Good Real Property*, 510 U.S. 43, 52 (1993).

### **A. The Interests Extinguished By The Alabama Court Affect Important Rights.**

The balancing test prescribed by *Mathews* requires an assessment of the importance of the protected interest at stake. In this case, Amicus submits, the property and liberty interests are of overwhelming significance because they affect fundamental individual rights.

At the outset, it might be suggested that the Alabama court did not completely extinguish plaintiffs' causes of action, but rather exchanged them for membership in the class. Setting aside the understandable dismay with which the plaintiffs might view yet another "exchange," the fact is that their causes of action trigger important rights: the right to trial by jury and counsel of choice. These rights *are* extinguished completely by the court's ruling.

It is Amicus' conviction that these rights are so fundamental that their infringement in the absence of a

compelling state interest cannot stand. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 & 38-39 (1972)(strict scrutiny of laws touching upon fundamental rights); *Boddie v. Connecticut*, 410 U.S. 371, 375-76 (1971)(recognizing fundamental right to access to civil litigation which is "the only effective means of resolving the dispute at hand."); and note 2, *infra*.

Even if this Court is hesitant to declare that the right to jury trial and counsel of choice are fundamental rights, Amicus submits that their importance adds considerable weight to the plaintiffs' side of the *Mathews v. Eldridge* balance.

*1. Certification of the Mandatory Class Eliminated Plaintiffs' Right to Trial by Jury on Their Claims for Monetary Damages.*

The property interest which was taken from plaintiffs was not money or personalty, but a vested cause of action. Bundled with that interest was the right to present their case to a jury. On May 26, 1994, without any waiver on plaintiffs' part, the Alabama court simply made that right disappear.

The Alabama Supreme Court held that certification did not violate plaintiffs' state constitutional right to a jury trial under Ala. Const. Art. 1, sec. 11. The court reasoned that so long as the court complied with the procedures to find that the absent plaintiffs were adequately represented by the class representatives, "the absent class members have had their day in court," albeit vicariously. 676 So. 2d at 1272. Significantly, this Court in *Logan* emphasized:

Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

455 U.S. at 432, quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

In federal courts, in cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial.<sup>1</sup> *Lorillard v. Pons*, 434 U.S. 575, 583 (1978); *Curtis v. Loether*, 415 U.S. 189, 195-198 (1974). Even "where equitable and legal claims are joined in the same action there is a right to a jury trial on the legal claims which must not be infringed by trying the legal issues as incidental to the equitable ones." *Ross v. Bernhard*, 396 U.S. 531, 537-38 (1970).

Amicus does not argue that the Alabama court violated the Seventh Amendment itself. This Court has not held that the Seventh Amendment right to trial by jury is incorporated into the Fourteenth Amendment Due Process Clause.<sup>2</sup> Rather, the importance of jury trial to our civil justice system, the value which the Seventh Amendment protects, is a measure of the importance of the property interest which plaintiffs lost. It is therefore a measure of what process is due before plaintiffs may be deprived of their property interest.

<sup>1</sup> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend VII.

<sup>2</sup> Alternatively, Amicus suggests that this Court affirmatively rule that the Due Process Clause of the Fourteenth Amendment incorporates the Seventh Amendment right to trial by jury, making that right applicable to the states. That this right is fundamental to Anglo-American law is clear from its historical roots in this country and from the fact that the right is explicitly guaranteed by most state constitutions. Amicus suggests that the right to trial by jury in civil cases is as "fundamental to the American scheme of justice" as the Sixth Amendment right to jury trial in criminal cases incorporated into the Fourteenth Amendment in *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).



Denial of the colonists' right to trial by jury was a primary grievance against the King, ultimately leading them to break free of England. Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993). Only after a commitment was made to include this right in a bill of rights could the Constitution win ratification. See Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (R. Rotunda & J. Nowak eds. 1987)(1833); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991). As this Court has stated:

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

*Dimick v. Schiedt*, 293 U.S. 474, 486 (1953).<sup>3</sup> "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, J., dissenting), and the right to trial by jury is guaranteed by virtually every state constitution.

Of particular significance in this case is the fact that the American colonists complained bitterly of efforts by the Crown to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals. See Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957);

<sup>3</sup> See also *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence."); *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded.").

*Parklane Hosiery*, *supra*, 439 U.S. at 340 (Rehnquist, J., dissenting). In view of this history, this Court has declared that:

Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attached and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989). "[N]or can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal." *Id.* at 51-52.

Yet this is precisely what certification of the class action accomplished in this case. By a perverse alchemy, certification of the class action and settlement transformed plaintiffs' common law damage claims, which included the right to trial by jury, into administrative claims which did not. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)(referring to class action as a "quasi-administrative proceeding").

## 2. Certification of the Mandatory Class Eliminated Plaintiffs' Right to Counsel of Choice

Of crucial importance in this case is the client's right to an attorney whose loyalty is undivided and uncompromised. The ethical rules governing the profession, for example, require that any conflict of interest be disclosed to the client, who may seek other representation or waive any objection. See ABA Model Rules of Professional Conduct Rule 1.7(b)(conflicts of interest); Rule 1.3 (duty to be diligent in representation of client).

An inherent problem in class actions is the fact that class counsel, charged with representing the class, necessarily has no obligation of loyalty to individual members of the class. As a jurist with considerable class action experience has noted, where class members seek monetary damages for individual wrongs, there are serious potential conflicts of interest among



class members and between class counsel and the class. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. L. Rev. 469, 502-06 (1994). For example, such class actions present "a built-in conflict of interest for the class attorney, who can obtain a generous award of attorney's fees, and perhaps equally generous relief for a few named plaintiffs and members of the class, by compromising the interests of absent class members through preclusion of their claims. George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. Rev. 258, 260 (1996). As a practical matter, it has been pointed out, those class members whose interests do not coincide with the class representatives or the class attorney are effectively "unrepresented." Brian Wolfman and Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U.L. Rev. 439, 441 (1996).

Placing monetary claims into the class action setting gives rise to serious potential problems of collusion. Not only is there a potential for overt illicit agreements -- payment to counsel from defendants in excess of an arm's length fee agreement in return for payments to the class below what they might otherwise obtain. Class actions also present what one scholar terms "structural collusion." That is, the interests of class counsel tend to become aligned with those of the defendant, to the detriment of class members, even without overt agreement. *See generally*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 1364-73 (1995).

For example, "defendants' ability to select plaintiffs' lawyers in this manner often sets up a 'reverse auction' in which defendants seek to identify the plaintiff's lawyer who will submit the lowest plausible settlement offer on behalf of the plaintiff class. The incentives involved may overwhelm the judgment of otherwise highly ethical lawyers." Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 826

(1995); *see also* John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L. Rev. 851, 853 (1995).

Amicus intends no criticism of class counsel in this case and does not support any suggestion in the briefs of either party that class counsel acted less than ethically. Nevertheless, the fact that a class member cannot fire his or her attorney eliminates an important check against the inherent potential for abuse. Amicus agrees that "[p]rocedures that allow class members to exit in response to inadequate representation of their interests directly address this problem." George Rutherglen, *supra*, 71 N.Y.U. L. Rev. at 281. Indeed, the very possibility that a significant number of class members will "vote with their feet" provides a healthy countervailing incentive for both class counsel and the defendant to treat class members equitably.

## **B. Affording An Opportunity To Opt Out Of the Class Action Is the Best Means Of Protecting Plaintiffs' Due Process Interests.**

### *1. Deprivation of Plaintiffs' Rights Cannot be Cured by a Finding of Adequacy of Representation.*

The second element in the *Mathews* analysis looks to whether there are alternative means of protecting the individual against deprivation of his or her property interest and "the probable value, if any, of additional procedural safeguards." 424 U.S. at 343.

The Alabama Supreme Court dismissed plaintiffs' state constitutional claims, stating that the absent class members' right to their "day in court" was satisfied because they were adequately represented by the named plaintiffs and class counsel who would be present. 676 So. 2d at 1272.

This Court has stated that a class action does not violate the due process rights of some class members who could not

be given notice where they were adequately represented by the named representatives of the class. *Hansberry v. Lee*, 311 U.S. 42 (1942). Amicus suggests that *Hansberry* stands for the reasonable proposition that the Due Process Clause does not command the impossible, i.e. notification of class members who could not be found. Cf., *Parratt v. Taylor*, 451 U.S. 527, 541 (1981) (due process does not require predeprivation hearing where the deprivation, negligent loss of a prisoner's property, was an unpredictable event).

However, the *Hansberry* Court did not prescribe adequate representation as a cure-all for any and every deficiency of due process. As the Court later explained in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), adequate representation is not the "touchstone of due process in a class action." 417 U.S. at 176. To suggest that adequate representation by itself is sufficient for due process, the Court stated, would "prove too much," leading to the conclusion that notice would never be necessary, provided there was adequate representation of the members of the class. *Id.* at 176-77. In that case, the Court required that notice be sent to over two million class members, specifically so that each would have an opportunity to "request exclusion from the action and thereby preserve his opportunity to press his claim separately." *Id.*

In addition, this Court did not deem adequacy of representation sufficient to protect absent class members in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Instead, the Court held that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the Court." 472 U.S. at 812.

Furthermore, the interests of plaintiffs in presenting their case to a jury and selecting counsel of choice are personal rights, serving values of autonomy.

The integrity, autonomy and dignity of the person is protected when clients make the decisions affecting their lives. As the owner of a legal claim, the client should have a 'presumptive right of control.' It is 'the client who will have to live with the outcome.'

Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 *Syr. L. Rev.* 709, 719 (1989) (footnotes omitted).

This Court noted in *Martin v. Wilks*, 490 U.S. 755, 762 (1989), the "deep-rooted historic tradition that everyone should have his own day in court." Tort victims in particular have a "vital interest" in having some measure of control over litigation that may affect their lives. *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974); *Causey v. Pan Am World Airways, Inc.*, 66 F.R.D. 392, 299 (E.D. Va. 1975); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); Robert G. Bone, *Rethinking the "Day in Court Ideal and Nonparty Preclusion*, 67 *N.Y.U. L. Rev.* 193, 286-87 (1992). See also Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 *U. Ill. L. Rev.* 69, 74 ("the right to control personally the suit whereby a badly injured person seeks redress from the alleged tortfeasor has long been valued both here and in England.").

Studies of litigants themselves reveal that their interest in seeking a jury trial goes beyond the amount of compensation recovered. In one empirical study, for example, claimants whose cases went to trial were more likely to report that that justice and fairness was accomplished, compared to those whose cases were disposed of through arbitration or other means. Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 *U. Ill. L. Rev.* 89, 99. Significantly, the "most frequently cited objective of lay litigants in adjudicatory proceedings was to 'tell my side of the story.'" *Id.* Other case studies confirm that plaintiffs who seek access to judicial remedies "seek something in addition to money." Judith Resnik, Dennis E. Curtis, Deborah R. Hensler, *Individuals*



*Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 363-72 (1996).

By definition, then, plaintiffs' protected due process interests cannot be enjoyed (or, more accurately relinquished) through representatives. At the least, Amicus submits, adequacy of representation should be based on the consent of those represented. The individual plaintiff in this case, however, is caught up in what one scholar calls the "serious problem of the 'kidnapped rider,' an individual deprived of any freedom of action by being drawn involuntarily into collective litigation." Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 821 (1995).

*2. Providing a Meaningful Opportunity to Opt Out of a Class Action Assures that Plaintiffs' Rights Are Set Aside Only On the Basis of Knowing and Voluntary Waiver.*

Important though they are, the rights to trial by jury and counsel of choice may be relinquished by knowing and voluntary waiver. Since these rights cannot be preserved within the class action context, Amicus submits that basic fairness requires that plaintiffs be given the choice between going it alone or casting their lot with the class.

The value of opting out as a procedural safeguard, essentially a waiver of rights, is suggested by Rule 23 itself. Rule 23(b)(3), which commonly applies to classes of claimants who seek monetary damages, and whose interests may therefore be divergent, requires that class members be afforded the opportunity to exclude themselves from the class. The absence of such a provision in the other subdivisions of Rule 23 reflects the view of the drafters that the interests of those classes are sufficiently homogenous that an opt-out would be of little use. The Advisory Committee's Note accompanying the 1966 Amendments to Rule 23 states that the (b)(2) subdivision was not intended to "extend to cases in which the appropriate final relief relates exclusively

or predominantly to money damages." By the very nature of a heterogeneous (b)(3) class, there would be many instances where a particular individual might not want to be included as a member of the class. To respect these individual interests, Rule 23 (c)(2) was intended to afford an opportunity to every potential member to opt out of the class. Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 104-05 (1966). *See also, Wetzel v. Liberty Mutual Ins Co.*, 508 F.2d 239, 250-53 (3d Cir. 1975)(right to opt out is not required in injunctive class action because of the homogeneity of class members' interests; it is required in (b)(3) class actions to preclude potentially inadequate representation when plaintiffs have disharmonious interests).

This Court has strongly indicated support for this view, stating, in a case involving money damages, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the Court." *Phillips Petroleum Co. v. Shutts*, *supra*, 472 U.S. at 812.

As Rule 23 is drafted, however, some class actions for monetary damages can be deemed to fall within (b)(1) or (b)(2). Indeed, it is a simple matter to add to a complaint seeking money damages a prayer for an injunction against the alleged misconduct. A significant number of courts have recognized the unfairness of denying plaintiffs the opportunity to opt out of a class that could have been certified under (b)(3), but was not. Some have provided this procedural protection as a matter of due process; others as a proper exercise of the court's discretion.

The value of the opt-out as a procedural safeguard of plaintiff's protected interest is reflected in the decisions of a significant number of courts. The Fifth, Eleventh, and Ninth Circuit Courts, have acknowledged that the "opt-out right is required . . . where personal monetary relief is being sought [because] the individual class members may have a strong



interest in pursuing their own litigation." *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. Unit B 1981). See also, *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

In *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) the court went even further and held that "the presence in the lawsuit of a significant number of atypical claims not common to the class activates a requirement that absent class members be given an opportunity to opt out of the class at the monetary stage of the Title VII lawsuit or settlement." 706 F.2d at 1155. "Because the monetary relief stage of this particular Title VII case [was] functionally more similar to a (b)(3) class than a (b)(2) class, the opt out protection of (b)(3) must be applied," even where the monetary claim is equitable in nature. *Id.*

In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed as improvidently granted, 114 S. Ct. 1359 (1994), where Brown had no opportunity to opt out of class action, the court concluded that "there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*." In *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 634-35 (9th Cir. 1982), a Title VII class action certified under subsection (b)(2), the Ninth Circuit allowed an opt-out in part because "[g]iven the breadth and nature of the claims asserted, the class allegations in plaintiffs' complaint, and the procedures adopted by the district court, it appears clear that this case was in essence a Rule 23(b)(3) action."

Other courts have exercised their discretionary powers in certain circumstances to require that 23(b)(2) class members receive notice and an opportunity to opt-out of the litigation. See *In re School Asbestos Litig.*, 789 F.2d 996, 1007 (3d Cir. 1986), cert. denied, 479 U.S. 852 (1986) (court reversed mandatory class action for cost of removing asbestos from schools, although the case continued as an opt-out class action); *In re A.H. Robins*, 880 F.2d 709, 744-45 (4th Cir.),

cert. denied, 493 U.S. 959 (1989) (although the class action was certified under (b)(1)(A), the district court issued notice to class members and allowed them to present their claims in individual hearings, a procedure the Fourth Circuit deemed equivalent to an opt-out).

See also, *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986) (approving the opt-out procedures in Rule 23(b)(2) class actions as provided for in *Penson* and *Holmes*, *supra*); *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979) (the opportunity to opt out of the class served to ameliorate any "antagonistic interests" between class representatives and absent members); *Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978), cert. denied, 444 U.S. 883 (1979) (the opt-out right was designed to permit the class members to seek monetary relief in individual actions rather than be limited to the injunctive relief sought in the class action); *DeGier v. McDonald's Corp.*, 76 F.R.D. 125 (N.D. Cal. 1977); *Walker v. Styres Indust.*, 21 Fed. Rules Serv. 2d 355 (M.D.N.C. 1976) (in Title VII class action where both injunctive relief and money damages were sought; the court ordered notice similar to that required by (b)(3)); *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465, 466 (W.D. Pa. 1972) ("in our discretion we do require that such notice be given so that requirements of due process be satisfied and all members . . . be given an opportunity to join or opt out."); *Allen v. Isaac*, 100 F.R.D. 373, 375-77 (N.D. Ill. 1983) (court exercised its discretion under Rule 23(d)(2) to permit class members to opt out, where it concluded that a 23(b)(2) action was, in reality, a hybrid 23(b)(2)-and-23(b)(3) action); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993) (providing back-end opt-out to class of plaintiffs with claims involving defective heart valve, without limits on recoverable damages).

**C. Governmental Interest Favors Extending Right To Opt Out To Members Of Class Action Certified Under Rule 23(B)(1) And (B)(2) Who Claim Monetary Damages.**

Against the weighty interests of the class members, under the *Mathews* analysis, must be balanced "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

*1. Affording Class Members Seeking Monetary Damages The Opportunity To Opt Out Of The Class Imposes Minimal Burden On The State.*

The government clearly has no general interest against affording the opportunity to opt out to class members seeking monetary damages. Indeed, Rule 23(b)(3) explicitly requires this procedural safeguard in many such cases. The appropriate inquiry is whether any legitimate government interest is affected by extending this right to plaintiffs seeking monetary damages whose claims are sought to be aggregated under (b)(1) or (b)(2).

Such an extension would impose little additional burden on the government. The burden and expense of providing notice to class members and an opt-out form is borne by the parties. Moreover, it may be anticipated that in most class actions that are conducted fairly and equitably, relatively few members would choose to opt out. A study by the Federal Judicial Center of Class Actions in four federal district courts found that the median percentage members of (b)(3) classes who opted out was 0.1 to 0.2%. See Thomas E. Willging, Laura L. Hooper, Robert J. Niemic, *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74, 135 (1966).

*2. Affording Class Members Seeking Monetary Damages The Opportunity To Opt Out Of The Class Advances State Interests.*

The prospect that members of the class might choose to "vote with their feet" is likely enhance the effectiveness of the judicial function. Providing the opt-out right in all class actions involving monetary damages avoids protracted legal battles concerning the proper classification of the class action under the subdivisions of Rule 23. The ability of class members to, in effect, fire their attorney, provides an incentive for class counsel to avoid the appearance of collusion, keep fees reasonable, and provide a fair apportionment of any award or settlement. The opt-out also assists the court in its obligation to assess the adequacy of representation. See George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. Rev. 258, 282 (1996)(the fact that many class members have opted out may constitute grounds for decertifying the class for reasons of inadequate representation).

The fact that some defendants may refuse to enter into a settlement unless all members of the class are prohibited from pursuing individual actions does not implicate a legitimate governmental interest. Although there may be a public interest in those situations where a large number of individual claims may exceed the assets of the defendant, Congress has already provided a statutory scheme for addressing this problem. Indeed, as a district judge has noted, "the use of subdivision (1)(B) might be seen as an end run around the bankruptcy law, giving the defendant some of the benefits of bankruptcy without its burdens (although even in bankruptcy, an injured plaintiff's right to a jury trial would be preserved.)" William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L. Rev. 837, 840 (1995). See, e.g., *In Re Joint Eastern and Southern District Asbestos Litigation*, 14 F.3d 726, 732 (2d Cir. 1993)(mandatory class



reversed as "evasion of the exclusive legal system established by Congress for debtors to seek relief.").

Other commentators have pointed out that use of mandatory class actions to impose settlement of tort claims evades some of the protections of tort creditors contained in the Bankruptcy Act, so that such settlements "may serve chiefly to effect wealth transfers from a corporation's tort creditors to its shareholders." John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L. Rev. 851, 856 (1995). See also, George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. Rev. 258, 286 (1996).

\* \* \*

This Court has found that the due process rights of defendants in civil cases are not exhausted even after full-fledged trial on the merits with its panoply of procedural protections. See *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)(defendant entitled to meaningful judicial review of punitive damage awards); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994)(state courts must provide opportunity for defendant to seek remittitur of punitive damages to avoid "arbitrary deprivation of property.") Surely due process entitles a plaintiff with a vested cause of action to be able to enter the courthouse door and present his or her case to a jury, rather than be swept up into a collective settlement.

## CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to reverse the judgment of the Supreme Court of Alabama.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

GUY E. ADAMS, ET AL.,

*Petitioners,*

—v.—

CHARLIE FRANK ROBERTSON and  
 LIBERTY NATIONAL INSURANCE COMPANY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
 TO THE SUPREME COURT OF ALABAMA

**BRIEF FOR THE STATES OF NEW YORK, VERMONT,  
 ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA,  
 HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, MICHIGAN,  
 MINNESOTA, MISSOURI, NEVADA, NEW HAMPSHIRE,  
 NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA,  
 PENNSYLVANIA AND TENNESSEE AND  
 THE DISTRICT OF COLUMBIA AS AMICI CURIAE**

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## INTEREST OF AMICI CURIAE STATES

The States of New York, Vermont, Arkansas, California, Connecticut, Florida, Hawaii,<sup>1</sup> Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, and Tennessee and the District of Columbia, as amici curiae, respectfully submit this brief pursuant to Supreme Court Rule 37. The case at bar raises important questions relating to the due process protections afforded to "absent", *i.e.*, nonresident, class members who find themselves members of plaintiff classes in class action lawsuits filed in other state courts, even where there are no minimum contacts sufficient to confer jurisdiction on the forum courts. We do not take a position on the merits of the underlying dispute before the Court. Rather, we wish to share with the Court the concerns and perspective on these issues of the state Attorneys General, who are charged with the responsibility of protecting the interests of their citizens.

At the outset, we wish to stress our belief that class action lawsuits are important vehicles that enable the citizens of our States to vindicate legal rights that may have been infringed on a broad scale. At the same time, because vital personal interests of our citizens are often implicated—whether the class action involves allegations (as here) of fraudulent switching of cancer insurance policies, or claims of serious personal injury as in the mass tort context—courts must ensure that the requirements of constitutional due process are met.

The amici States have a number of important interests in the case at bar. Under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), absent class members who do not possess

<sup>1</sup> Of the states participating, all except Hawaii are represented by the Attorneys General of the respective states. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's office, but is statutorily authorized to undertake consumer protection functions, including legal representation of the state. For the sake of simplicity, we will refer to the whole group, including the District of Columbia, as the "Attorneys General" or the "amici States".

minimum contacts with the forum state may be bound by a class action judgment or settlement, but only if certain procedural due process requirements are met. These include the right to opt out (at least where claims for money damages are involved), to be notified of the action and have an opportunity to participate in it, and to be adequately represented. However, in the face of growing concern over the subordination of the interests of absent class members to the interests of others, including class counsel and other individuals competing for monetary relief from the same defendant, the amici States wish to ensure that the protections afforded by *Shutts* are fully and meaningfully implemented. Without these protections, valuable property rights of our citizens may be compromised or even extinguished without the due process of law guaranteed them by the Fourteenth Amendment.

Additionally, we are concerned that citizens of our states will be barred from challenging the jurisdiction of distant forums in our own state courts. Whenever an absent class member is purportedly bound by the outcome of a class action, that member is entitled to challenge the res judicata effect of the class settlement or judgment in another court on grounds of lack of personal jurisdiction of the forum court. However, if, as happened here, a state court can enjoin absent class members from litigating any claim involved in the class action in any forum, this right to challenge the class action forum's jurisdiction will be seriously curtailed, to the detriment of out-of-state citizens.

In presenting these views to the Court, the amici States seek to ensure fairer outcomes for those countless individuals who each year find themselves named as parties in class actions of others' creation.

## SUMMARY OF ARGUMENT

It is a fundamental principle of our constitutional system that individuals cannot be bound by a judgment in a litigation to which they are not a party. *Pennoyer v. Neff*, 95 U.S. 714 (1877). The class action device is a limited exception to this traditional rule. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

While this Court has recognized that circumstances may exist which would allow a forum state to exercise binding jurisdiction over the claim of an absent class action plaintiff, due process requires that, at least where substantial monetary interests are at stake, absent class members lacking minimum contacts with the forum state must be provided with minimum constitutional protections, including the ability to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811-12.

Given the amply demonstrated potential for abuses in class action settlements, due process further requires that procedural protections for class members be provided in a meaningful way. This includes ensuring that class members receive notice of the settlement that is understandable to lay people and contains sufficient information about the action and any proposed settlement to allow class members to make an informed decision as to whether to retain counsel, opt out, or object. Absentee class members are also entitled to adequate representation, free of the conflicts of interest that have plagued many recent multistate class actions. Thus, if class counsel represents individuals with claims similar to those of class members in separate litigations, the potential for an inherent conflict of interest exists which is inconsistent with adequate representation. Class settlements which extinguish class members' monetary claims but provide excessive attorney's fees for class counsel also suggest the existence of a financial conflict which undermines the adequacy of class representation.



Finally, although an absent class member is always entitled to challenge the res judicata effect of a class action settlement or judgment in another court on grounds of lack of personal jurisdiction, the trial court's order below in fact sought to enjoin any such challenge. In order to prevent such overreaching by forum courts, this Court should find that courts are without power to enjoin plaintiff class members from collaterally attacking a class judgment or settlement for lack of jurisdiction.

## INTRODUCTION AND STATEMENT OF CASE

In *Phillips Petroleum Co. v. Shutts*, the Court held that

a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

472 U.S. at 811-12 (citations and footnotes omitted).

However, in the decade since *Shutts* was decided, a rising tide of criticism about how class actions function in real life has engulfed the legal community and the public at large. Allegations of settlements of little benefit or actual harm to

class members, of collusion between opposing counsel, of conflicts of interest on the part of class counsel, and of incomprehensible notifications to class members have begun to erode confidence in the fairness of class settlements.<sup>2</sup>

<sup>2</sup> The potential for abuses in class action litigation has been well documented in both the case law and the literature. See, e.g., *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litigation*, 55 F.3d 768, 787 (3d Cir. 1995), cert. denied sub nom. *General Motors Corp. v. French*, 116 S.Ct. 88 (1995) (vacating district court's orders certifying settlement class and approving settlement; "[W]ith less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses"); id. at 803 (expressing concern that "counsel may have pursued a deal with the defendants separate from, and perhaps competing for the defendant's resources"); *In re Asbestos Litigation*, 90 F.3d 963, 993-1026 (5th Cir. 1996) (Smith, J., dissenting); *In re Ford Motor Co. Bronco II Prods. Liab. Litigation*, 1995 U.S. Dist. LEXIS 3507, at 28-29, 32 (E.D. La., Mar. 15, 1995) (rejecting proposed settlement of multidistrict litigation, noting that "[n]ot only are the terms of the proposed settlement inadequate, but there is evidence that class counsel's representation was also inadequate" and that the proposed settlement "could possibly be the result of collusion between the defendant and class counsel"); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litigation*, 526 F. Supp. 887, 893 (N.D. Cal. 1981) (certifying mandatory nationwide class on punitive damages issues due to "unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress"), rev'd, 693 F.2d 847 (9th Cir. 1982), cert. denied sub nom. *A.H. Robins Co. Inc. v. Abed*, 459 U.S. 1171 (1983); R. POSNER, AN ECONOMIC ANALYSIS OF LAW 570 (4th ed. 1992) (no one has stake in size of class action judgment except defendant, who has interest in minimizing it; class counsel will be tempted to offer to settle with defendant for small judgment and large fee; and lawyers largely control access to information by court, which is charged with approving settlement); Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (hereinafter "Class Wars"); Coffee, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851 (1995) ("it is increasingly the corporate defendant that wishes to be sued in a class action and—with the help of a friendly plaintiffs' attorney—that often actively arranges for such a suit to be brought by a nominal plaintiff"); Coffee, *Rethinking the Class Action*, 62 IND. L.J. 625, 628-29



In the case at bar, an Alabama state court certified a nationwide class of cancer insurance policyholders and issued an

(1987) (describing potential for conflicts of interest in class action litigation in terms of "agency costs"); Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 813 (1995) (hereinafter "*Individualized Justice*"); Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975) (coining phrase "lawyer-entrepreneur" to describe class counsel); Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995) (hereinafter "*Feasting*"); Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 13 (1995); Macey & Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation*, 58 U. CHI. L. REV. 1, 7-8 (1991) (class counsel not subject to monitoring by class, operating "largely according to their own self-interest"); Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222, 1225 (1995) (describing "third stage of concern" about class actions as "mov[ing] beyond a focus on the temptations of class counsel to an analysis of how those opposing the class—that is, defendants and their lawyers—can manipulate those temptations for their own benefit"); Eichenwald, *Class-Action Suit Deadline Expired, Prudential Argues*, N.Y. TIMES, Dec. 11, 1995, at D2; Eichenwald, *Lawyers Receiving \$22.6 Million of Prudential Settlement*, N.Y. TIMES, May 20, 1994, at D2; Eichenwald, *Millions for Us. Pennies for You*, N.Y. TIMES, Dec. 19, 1993, at § 3, 1; Henriques, *High Court Hands Corporations Victory on Class-Action Suits*, N.Y. TIMES, Feb. 28, 1996, at D1; Leer, *Thanks to Lawyers, I'm 93 Cents Richer*, SAN DIEGO UNION-TRIBUNE, July 14, 1996, at G3; Meier, *Math of a Class-Action Suit: 'Winning' \$2.19 Costs \$91.33*, N.Y. TIMES, Nov. 21, 1995, at A1; Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at D1; Paltrow, *Lawyers to Get 25% of Prudential Class-Action Settlement; Securities: Judge Apparently Ignores Complaints from SEC and California Officials that the Fee Requests Were Excessive*, L.A. TIMES, May 20, 1994, at D1; Phelps, *Attorneys Who Get Paid in Cash Irrk Clients Who Get Paid in Scrip*, STAR TRIBUNE, April 17, 1994, at 4D; Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1; Schonbrun, *How Public Can Stop Class-Action Racket*, S.F. CHRON., Oct. 18, 1993, at B3; Walt, *Truck Lawsuit Shifts into Reverse; Attorney Fees Issues Cited in Ruling*, THE HOUSTON CHRONICLE, Feb. 10, 1996, at Business, 1; Walker, *Class-Action Suits Overdue for Fee Reform*, SACRAMENTO BEE, June 6, 1993, at B7; Weinstein, *Class Action Filings; Often are Lawsuit Abuse*, DALLAS MORNING NEWS, July 28, 1996, at 6J.

order which, among other things, approved a mandatory non-opt-out settlement between the plaintiff class and the defendant insurer, Liberty National Life Insurance Company. A significant portion of the class—approximately 176,000 out of 397,000 class members—was made up of persons residing outside the state of Alabama. *Adams v. Robertson*, 676 So. 2d 1265, 1297 (Ala. 1995) (Appendix). Robertson, the named plaintiff, had originally filed a complaint in the Alabama court alleging unauthorized loans on a life insurance policy. 676 So.2d at 1268.

Thereafter, Robertson amended his complaint to add class action allegations that Liberty National fraudulently induced long-time cancer insurance policyholders to exchange their existing cancer insurance policies for newer policies with higher premiums and significantly reduced coverage. 676 So.2d 1277. Robertson sought money damages on behalf of the policyholders<sup>3</sup> and initially recommended certification of the class under the provision of the Alabama Rules of Civil Procedure that would have allowed persons whose policies had been switched to opt out of the class.<sup>4</sup> Nevertheless, on March 10, 1993, the Alabama trial court preliminarily certified the class under Rule 23(b)(2) **only**, which does not provide for a right to opt out by class members. 676 So.2d at 1278 (Appendix). Thereafter, on February 4, 1994, the Alabama trial court also certified the class under two additional subsections of Ala. R. Civ. P. 23<sup>5</sup> which were not rec-

<sup>3</sup> The class representative's amended complaint stated a claim for monetary damages for fraud, 676 So.2d at 1277 (Appendix), and the motion for class certification confirmed that the action was brought for damages. *Id.* App. at 42-44. The petitioners also argued below that class members paid higher premiums on the "new" insurance policies to which they were switched by Liberty National. *See* 676 So.2d at 1272.

<sup>4</sup> The named plaintiff recommended certification under Ala. R. Civ. P. 23(b)(2) and 23(b)(3). *Id.* App. at 42-44. Rule 23(b)(3) is the only provision allowing a right of opt-out to class members. Ala. R. Civ. P. 23(b) parallels Fed. R. Civ. P. 23(b).

<sup>5</sup> Ala. R. Civ. P. 23 (b)(1)(A) and 23 (b)(1)(B).

ommended by the named plaintiff in the original class certification motion as the preferable bases for certification. Those sections likewise do not provide for an opportunity for class members to opt out of the class.

On May 26, 1994, the Alabama trial court issued an Order and Final Judgment which, among other things, (a) certified the class for settlement under Rules 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2), (b) approved the settlement agreement between the plaintiff class and Liberty National,<sup>6</sup> (c) permanently enjoined class members from litigating any of the dismissed or released claims **in any court**, and (d) approved a fee award to class counsel in the amount of \$4.5 million. 676 So.2d at 1302-1307 (Appendix).

Several features of the case at bar illustrate the kinds of problems that have afflicted nationwide or multistate class actions in recent years and that can undermine the device as a method of fairly treating the interests of absent class members. First, despite the presence of substantial monetary claims, this action was certified as a non-opt-out class. Without any finding that absent class members had minimum contacts with Alabama,<sup>7</sup> those class members were forced to accept whatever settlement was approved by a foreign (Alabama) court.

Second, the notice to the class described the settlement in densely printed legalese and was of questionable help in assisting class members in making an informed decision as to whether to object to the settlement or retain an attorney.

<sup>6</sup> Under the settlement, Liberty National reformed the new policies to provide the same benefits afforded under the old policies and offered to persons who had actually suffered cancer and whose benefits were affected by the switching of policies, up to 150% restitution of monetary benefits lost as a result of the reduction of coverage. 676 So.2d at 1305 (Appendix).

<sup>7</sup> Although the trial court found that the **litigation** had significant contacts with Alabama, the court never found that **absent class members** had minimum contacts with that state. See 676 So.2d at 1297 (Appendix).

Third, class counsel appears to have failed to provide adequate representation to the class, at least in part as a result of what has the appearance of a serious conflict of interest. As certified in the settlement jointly proposed by class counsel and Liberty National, the class excluded all insureds who, prior to the certification order, had filed a separate action against Liberty National asserting claims similar to those raised in the class action. 676 So.2d at 1303 (Appendix). Shortly before the trial court preliminarily certified the class, class counsel filed lawsuits on behalf of four of his individual clients.<sup>8</sup> In effect, class counsel managed to obtain an automatic opt-out for those persons whom they successfully removed from the class. Moreover, the named class representative, also represented by class counsel, received a \$150,000 payment in settlement of his original claims against Liberty National based upon allegedly unauthorized loans.<sup>9</sup>

Although class counsel's individual clients who were excluded from the class and the named representative were all positioned to receive substantial monetary compensation from Liberty National, the representation afforded to class members appears qualitatively different and deficient: counsel made a settlement for the class that released all of their claims for compensatory and punitive damages, for the most part without any monetary compensation. Add to this the payment of \$4.5 million in fees to class counsel, and very substantial doubts are raised as to whether class members were adequately represented.

The Court is urged to respond to the concerns raised in *Adams* with a reevaluation, reaffirmance and strengthening of the due process requirements that shield absent class members from unconstitutional deprivations of their rights. New prob-

<sup>8</sup> *Gould v. Liberty National Life Ins. Co.*, No. CV-93-024 (Barbour County Cir. Ct. 1993); *Stewart et al. v. Liberty National Life Ins. Co.*, No. CV-93-025 (Barbour County Cir. Ct. 1993).

<sup>9</sup> See Petition for a Writ of Certiorari at 10.



lems demand new protections, or at least old protections newly clarified and amplified.<sup>10</sup>

## ARGUMENT

### I.

#### AT LEAST WHERE SUBSTANTIAL MONETARY INTERESTS OF ABSENT CLASS MEMBERS WITHOUT MINIMUM CONTACTS WITH THE FORUM STATE ARE INVOLVED, DUE PROCESS REQUIRES THAT SUCH CLASS MEMBERS BE PERMITTED TO OPT OUT OF THE CLASS.

For the purpose of its holding in *Phillips Petroleum Co. v. Shutts*, the Court limited the requirement of the right to opt

<sup>10</sup> Procedural due process has proven itself to be a flexible, not a static concept. For example, in 1940, in *Hansberry v. Lee*, the Court reserved judgment on what other procedures the Constitution might in the future require, see 311 U.S. at 43-44. Ten years later, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Court opined that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Then, in 1985, in *Shutts*, the Court further made clear that the rights of absent plaintiff class members include adequate representation and, in actions for damages, the right to opt out. See also Schwarzer, *Symposium: Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 843-44 (1995) (recommending that Rule 23(e) be amended to require that when ruling on an application for dismissal or compromise of class action, courts should determine whether notice to class members is adequate, "taking into account the ability of persons to understand the notice and its significance to them"; whether representation of class is adequate, "taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants"; whether opt-out rights are adequate to protect class members; and whether provisions for attorney's fees are reasonable).

out to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3. The Court expressly intimated no view concerning the applicability of that right to other types of class actions, such as those seeking equitable relief. See 472 U.S. at 811-12 n.3. Assuming that there is a constitutional rationale for hinging a due process right on the remedy sought, the instant case requires further line drawing: how does one tell when a class action for monetary and equitable relief involves claims "wholly or predominately for money judgments"?

When the Court in *Shutts* determined that some procedural rights but not others (such as an "opt-in" requirement) apply to plaintiff class actions, it based its analysis on the interests at stake. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The Court has considered three factors in identifying the "specific dictates" of due process that are required in any particular context: the private interest that will be affected; the risk of an erroneous deprivation of the interest through the procedures used and the probable value of other procedural safeguards; and the government's countervailing interest. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Connecticut v. Doe*, 501 U.S. 1, 11 (1991) (where government is not a party, analysis of governmental interest factor should involve consideration of legitimate interests of private party who is defending procedure in question<sup>11</sup>).

Based on this standard, a court deciding whether a right to opt out should be afforded absent class members must focus on the nature of the claims advanced by the plaintiff class,

<sup>11</sup> For example, not subjecting the defendant to inconsistent verdicts is a legitimate interest. On the other hand, facilitating collusion between defendants and class counsel obviously is not a legitimate interest.



and the nature of the claims sought to be compromised or extinguished by the defendant. At least where a substantial monetary interest is at stake or at risk of being lost and when the forum court otherwise lacks personal jurisdiction over the absent class members, the right to opt out must apply.<sup>12</sup> It is indisputable that a cause of action is a constitutionally recognized property interest, and as such, its deprivation without the right to opt out risks the denial of due process. See *Mullane*, 339 U.S. at 313 (recognizing cause of action for damages as property right); *Shutts*, 472 U.S. at 807 (affirming that chose in action is constitutionally recognized property interest possessed by each class member); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (Fourteenth Amendment's Due Process Clause prevents states from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s].") quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). In light of the interests involved, this added protection is necessary to overcome the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. at 40; accord, *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761, 1765-66 (1996); see also *McKinney v. Alabama*, 424 U.S. 669 (1976); *Postal Telegraph Cable Co. v. City of Newport, Ky.*, 247 U.S. 464 (1918).

<sup>12</sup> The amici States intentionally focus not on whether the claims are "wholly or predominately for monetary judgments", *Shutts*, 472 U.S. at 811 n.3, but rather on whether there is a substantial monetary interest at stake. Because the value and extent of equitable relief requested or ordered can be inflated by the defendant or class counsel so that substantial monetary claims are made to appear subordinate to equitable relief, we believe that the analysis should focus instead on the significance of the monetary interest at stake.

The right to opt out provides a necessary "safety valve" for those individuals who, for whatever reason, wish to exclude themselves from the binding effect of a class action judgment entered by a foreign and often distant court. Without such a right, absent class members whose claims will be released without monetary compensation, or for inadequate compensation, have no choice but to retain independent counsel and incur considerable expense litigating their objections in a foreign state court. Imposing such a burden on those who lack minimum contacts with the class action forum violates the reasoning of *Shutts* and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Moreover, such a process may force absent class members to submit to the jurisdiction of the foreign court to press their objections. See *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171 (8th Cir. 1995) (in non-opt-out class action, absent class members appearing *pro se* subjected themselves to forum court's jurisdiction by submitting memoranda on fairness of settlement along with written request to opt out of class).

Because of the critical due process implications, courts should look beyond the particular labels attached to the relief by either the defendant or the class representative and the particular joinder device(s) employed. See *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994) (opt-out right available where foreclosure of substantial claims for damages involved, regardless of fact that class was certified under Rule 23(b)(1) and (b)(2)); *In re Asbestos Litigation*, 90 F.3d at 1004 (Smith, J., dissenting) (distinction in *Shutts* between damage and equitable remedies as affecting extent of procedural protections required by due process must turn on what remedies plaintiff seeks, not on choice of joinder devices). A trial court determination that a class that seeks monetary relief should be certified under Rule 23(b)(1) or (b)(2) cannot serve thereby to limit the due process rights to which class members are entitled. If class counsel and the defendants could avoid *Shutts*'

procedural protections by tacking on a request for an injunction or asserting that the defendant's funds are not unlimited, every class action for monetary damages might be transformed into a non-opt-out class, and *Shutts*' protections would be eviscerated.<sup>13</sup>

The States thus urge the Court to clarify that the right to opt out must be preserved, at least where the class seeks substantial monetary relief, or where substantial monetary interests may be affected by the class judgment or settlement, and where absent class members lack minimum contacts with the forum court.

## II.

### ALL CLASS MEMBERS ARE ENTITLED TO NOTICE THAT IS MEANINGFUL TO THEM.

In all cases, but particularly where the right of opt-out does not obtain, meaningful notice is key to the class members' ability to participate in or object to a class action settlement or judgment. In determining that due process requires notice to absent class members, the Court in *Phillips Petroleum Co. v. Shutts* held that the notice must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 472 U.S. at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314-15).

<sup>13</sup> Even where the class complaint does not seek monetary relief, any determination as to whether absent class members have the right to opt out under *Shutts* should take into account monetary interests that may be compromised or lost as a result of the class action. See, e.g., *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873 (1996) (where claims were settled that were not in complaint).

Embedded in this description are at least three notions. Reasonable efforts should be made to ensure that the notice reaches the people to whom it is directed. When it does, it must be "reasonably calculated . . . to apprise." Finally, the notice must afford an opportunity to present objections. While the first requirement focuses on the manner in which the notice is delivered, the second and third requirements go to the **content** of the notice. The notice "must be of such a nature as reasonably to convey the required information." *Mullane*, 339 U.S. at 314 (citation omitted); accord, *Greene v. Lindsey*, 456 U.S. 444, 451 (1982).

The qualitative and quantitative content of the notice is crucial. If the notice is not easily understandable to class members, it cannot fairly apprise them of the pendency of the action and afford them an opportunity to present their objections. Likewise, if the notice does not contain all of the information reasonably necessary for a person to decide whether to retain separate counsel, opt out, or object, the fundamental purposes of the notice are undercut. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

According to an important recent study, class action settlement notices do not generally provide the net amount of the settlement or the estimated size of the class: "[r]arely would a class member have the information from which to estimate his or her individual recovery." Moreover, because of the common use of technical language, it appears that "most notices are not comprehensible to the lay reader." Willging, Hooper and Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 134 (1996) (Final Report to the Advisory Committee on Civil Rules) (Federal Judicial Center 1996); see also Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 321 ("The sad truth is that notices issued by courts or attorneys



typically are much too larded with legal jargon to be understood by the average citizen.""); Adams, *Deliberate Obfuscation*, FORBES, September 9, 1996, at 152-54.<sup>14</sup>

To ensure, then, that the content of a class action notice is reasonably calculated to achieve the constitutional purposes of the notice, certain minimum standards should be met. The notice should first be written in language that a lay person of reasonable but unexceptional intelligence can be expected to understand, with all necessary disclosures set out clearly and conspicuously. Clear and comprehensible language also serves to minimize the need for individuals in the class to hire their own counsel, thus promoting the end of judicial efficiency in the conduct of the class litigation.

<sup>14</sup> The Notice of Pendency of Action, Class Action Determination, Settlement and Settlement Hearing in the instant case includes seven pages of close type, to which were attached 23 pages of appendices, including the Order with Respect to Proposed Settlement, the Stipulation and Agreement of Compromise and Settlement, and the Order and Final Judgment. The Notice contains such impenetrable sentences (to the legally uninitiated) as:

All Class Members who qualify under paragraphs II-10 and II-11 of the Stipulation and who were named insureds under new policies under which any benefit claim has previously been submitted for cancer treatment administered to a covered person, will, if such treatment included radiation, chemotherapy, prescription chemotherapy drugs, or out-of-hospital prescription drugs prescribed in connection with cancer, receive full restitution of any amount by which the total of all benefits *which would have been received* by the Class Member as a result of the cancer treatment *under the old policy* (had the old policy stayed in force) would have exceeded the amount *actually paid* to (or to the assignee of) the named insured Class Member under the new policy.

Jt. App. at 292-93 (italics in original). The court below considered and approved this notice to class members. Adams, 676 So.2d 1283-84 (Appendix). However, neither that court, nor any other of which we are aware, expressly addressed the understandability of the class notice as an element of adequacy.

Second, the notice should contain sufficient disclosure of the costs and benefits of participation in the class action to allow class members to make an informed decision as to whether to opt out. When the notice concerns a proposed class action settlement, the required disclosures should necessarily include at least a good faith estimate of the aggregate sum of any monies to be paid to class members and others by the defendant and how these monies would be divided; the rights that class members would lose or waive, and any obligations imposed upon them, by virtue of the settlement; and the amount and method of calculation of all attorney's fees. See *General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (notice sent to over 600,000 truck owners was deficient in that it did not set forth maximum amount of attorney's fees sought by class counsel and specify method of calculating those fees); cf. Reduction of Abusive Litigation Act, 15 U.S.C. § 77z-1(a)(7) (in private securities litigation, requiring notice to class members of settlement terms, including amount of aggregate and individual proposed recovery, information on potential outcome of case, and amount and explanation of attorney's fees); S.1887 (104th Cong., 2d Sess.) (Protecting Class Action Plaintiffs Act of 1996) (requiring similar disclosures in class action notices).<sup>15</sup> As the court reasoned in *Bloyed*, notice of the attorney's fees is essential because without such notice, class members cannot gauge the possible influence of the fees on the settlement when they consider whether to object to it.<sup>16</sup> 916 S.W.2d at 958.

<sup>15</sup> Such disclosures are already required by professional conduct standards. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106 (attorney who represents two or more clients shall not participate in making an aggregate settlement, unless each client has consented, after being advised of, *inter alia*, existence and nature of all claims involved and total amount of settlement); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (requiring disclosure of existence and nature of all claims and of participation of each person in settlement).

<sup>16</sup> Other courts have similarly rejected class settlements for, *inter alia*, such defects in the notice to the class. See *In re General Motors*



Last, the notice should not contain any language that would unreasonably discourage class members from going to an attorney or objecting to a settlement.

### III.

#### ALL ABSENT CLASS MEMBERS ARE ENTITLED TO REPRESENTATION THAT ADEQUATELY PROTECTS THEIR INTERESTS.

The Court in *Phillips Petroleum Co. v. Shutts* stated that the Due Process Clause "of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." 472 U.S. at 812 (citing *Hansberry v. Lee*, 311 U.S. at 42-43, 45). This requirement of "adequacy" applies equally to class counsel. See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litigation*, 55 F.3d at 801; *North American Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir. 1979); *In re Fine Paper Antitrust Litigation*, 617 F.2d 22, 27 (3d Cir. 1980). Last term, the Court reaffirmed this requirement in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761. Also in her concurrence in *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. at 890, Justice Ginsburg stressed the "centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement."

The requirement of adequate representation involves more than minimal competence on the part of lawyers; it necessarily requires that class counsel be free of conflicts that might compromise the interests of class members. See *Matsushita*, 116 S. Ct. at 888 n.5 (Ginsburg, J., concurring) (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982), for proposition that Rule 23(a)(4)'s

*Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1130 (7th Cir. 1979); *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980), cert. denied, 449 U.S. 1011 (1980).

adequate representation requirement raises concerns about conflicts of interest on part of class counsel); see also *Prezant v. DeAngelis*, 636 A.2d 915, 925 (Del. 1994) (cited in *Matsushita*, 116 S. Ct. at 889) (adequate representative without conflict of interest may present different facts and a different settlement proposal to court than would inadequate representative).

Yet recent class actions have been plagued by a variety of such conflicts of interest, leading to allegations of collusive or otherwise improper conduct on the part of class counsel. See *supra* at 5-6 n.2. In particular, settlement class actions create "unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and meager recovery for the class." *In re Asbestos Litigation*, 90 F.3d at 1000 (Smith, J., dissenting) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litigation*, 55 F.3d at 788), and Cramton, *Individualized Justice*, 80 CORNELL L. REV. at 826-27.

The potential for such conflicts inheres in several aspects of the class action as a procedural device. Class members have little or no practical control over class counsel, who in fact often chooses the class representative. See *In re Asbestos Litigation*, 90 F.3d at 1009 (Smith, J., dissenting). Class counsel may decide simultaneously to represent individual class members as well as the class as a whole, giving at least the appearance of gaining a financial interest in settling the class claims for little in exchange for preferential treatment of the individual clients. A similar conflict may arise out of the parallel representation of class members with extant claims, whose interests are served by maximizing their immediate recovery, and those with latent claims, who are benefitted by damage caps that preserve the settlement fund for future claims. See *In re Asbestos Litigation*, 90 F.3d at 1011 (Smith, J., dissenting). In addition, the ability of the presiding judge to guard against conflicts by means of the required fairness

hearing is limited by the judge's unavoidable dependence on counsel for information. See MANUAL FOR COMPLEX LITIGATION, THIRD (hereinafter "MCL") § 30.43 (1995) ("Counsel for the parties are the court's main source of information concerning [a class action] settlement.").

In all cases, but particularly where an opportunity to opt out is not afforded, adequate representation must mean more than a "fair deal" being struck to settle a case. No doubt, what a court may view as a "fair" deal could have been much "fairer" if counsel had been free of conflicts.<sup>17</sup>

The existence—or at the very least the appearance—of these conflicts is not theoretical, as can be seen from the instant case. Here, class counsel also represented individuals with the same claims as the class. In a settlement proposal jointly presented by class counsel and the defendants, these individuals were excluded from the class and, as a consequence, unlike the class members, were not required to release their claims for monetary damages against Liberty National. Additionally, the named plaintiff received a substantial payment from Liberty National in settlement of his earlier claims. Moreover, while class members were deprived of the right to seek any monetary, *i.e.*, compensatory or punitive damages, class counsel received \$4.5 million in fees. Nothing in the decision below reveals the basis for the court's approval of a fee of that magnitude.

<sup>17</sup> See *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988) ("Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result.' " [citation omitted]); *Adams Extract Co. v. Chesapeake Corp. of Virginia (In re Corrugated Container Antitrust Litigation)*, 643 F.2d 155, 211 n.25 (6th Cir. 1981) ("[T]he adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party in a conflict position."); Haudek, *The Settlement and Dismissal of Stockholders' Actions—Part II: The Settlement*, 23 SW. L.J. 765, 771-72 (1969).

The Court should clarify that adequate representation, an important constitutional requirement, is a substantive concept that requires all courts to examine the representation afforded absent class members with reference to objective standards. Adequate representation should be more than a vague or empty concept; it should require more proof than that a licensed attorney has managed to settle (or "cut a deal") with the defendant.<sup>18</sup> The Court should consider taking several steps in furtherance of this goal.

One is to clarify that freedom from conflicts that have a strong likelihood of adversely affecting the representation is an essential element of adequate representation, and that the courts are responsible for guarding against such conflicts. See *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980) (reversal of criminal conviction warranted for lack of effective assistance of counsel where counsel is burdened by actual conflict). To this end, parallel representation of the class and individuals with similar claims in separate actions against the defendant should be prohibited entirely as inconsistent with adequate representation. See *In re Asbestos Litigation*, 90 F.3d at 1010-11 (Smith, J., dissenting). In the criminal context, this Court has carefully guarded the vulnerable client—the criminal defendant—from his appointed counsel. See *Cuyler*. The Court needs to be at least as protective of vulnerable absent class members who, like most criminal defendants, neither choose their own counsel nor have an ability to monitor their lawyers' performance. Innocent citizens who allege they have been civilly wronged deserve at least as much protection from their lawyers' conflicts of interest as citizens charged with wrongdoing by the State.

Another safeguard is to require—again, as an element of adequacy—that class counsel provide the court with sufficient information on the costs as well as the benefits of any recommended settlement, to allow the reviewing court to make an informed evaluation of the fairness of the settlement. See

<sup>18</sup> Koniak, *Feasting*, 80 CORNELL L. REV. at 1115-26.



MCL § 30.43 (counsel must disclose to court any facet of proposed class action settlement that may adversely affect any member of class or result in unequal treatment of members of class).

A third measure to consider, at least in those situations where the potential for harm to the interests of class members is greatest, is the required appointment of an advocate for the class. The advocate would have to have full access to information from class counsel and would be responsible for identifying features of any proposed settlement that are potentially harmful to class interests, and for informing the court of those features. In some past class actions, similar appointments have been made or endorsed. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 310 (court appointed special guardian and attorney for class members); *Ivy v. Diamond Shamrock Chem. Co. (In re Agent Orange Prod. Liab. Litigation)*, 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (court ordinarily would anticipate appointment of guardian to represent interests of absent class members).

#### IV.

#### A COURT MAY NOT, CONSISTENT WITH THE REQUIREMENTS OF DUE PROCESS, ENJOIN ABSENT CLASS MEMBERS FROM CHALLENGING A CLASS SETTLEMENT IN ANOTHER FORUM.

As the Court held in *Hansberry v. Lee*, 311 U.S. 41-43,<sup>19</sup> the constitutional sufficiency of adequate representation in a class action is always open to collateral attack by absent class members.<sup>20</sup> *See also Matsushita*, 116 S. Ct. at 888 (Ginsburg,

<sup>19</sup> *Hansberry* was recently reaffirmed in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761.

<sup>20</sup> This principle logically extends beyond lack of adequate representation to encompass any failure of due process or personal jurisdiction, including lack of adequate notice.

J., concurring) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement.").<sup>21</sup>

One constitutionally problematic aspect of the case at bar is the fact that the Alabama court permanently enjoined class members from participating as litigants in any action where a claim dismissed or released by the class in the settlement was at issue.<sup>22</sup> The effect of this order is to subject class members to contempt for doing what settled principles of due process clearly permit: challenging the jurisdiction of the settling court on the grounds of failing to comply with the dictates of the Constitution. Moreover, to the extent that the Alabama court enjoined absent class members from prosecuting actions in federal court, it lacked the power to do so. *See Donovan v. City of Dallas*, 377 U.S. 408 (1964); *accord, General Atomic Co. v. Felter*, 434 U.S. 12 (1977).

In the case of a class action, a due process infirmity such as inadequate representation or notice makes it virtually impossible for an absent class member to challenge the jurisdiction of the court in the original proceeding. *See Battle v. Taylor*, 770 F. Supp. 1499, 1512-13 (N.D. Ala. 1991), *aff'd per curiam*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied sub nom.*

<sup>21</sup> *Accord, In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760, 769 (3d Cir. 1989), *cert. denied sub nom. Chicago Title Ins. Co. v. Tucson Unified School Dist.*, 493 U.S. 821 (1989) ("Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme."); 7B C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1789 at 245 (2d ed. 1986) (court conducting an action cannot predetermine res judicata effect of judgment; that effect can be tested only in subsequent action); *see also* NEWBERG & CONTE, *NEWBERG ON CLASS ACTIONS* § 16.25 at 133-37 (3d ed. 1992).

<sup>22</sup> The trial court's Order and Final Judgment enjoined all class members from "filing, initiating, asserting, maintaining, pursuing, or continuing or participating as a litigant (by intervention or otherwise) in any action . . . asserting any of the claims dismissed herein or any of the Released Claims . . ." *Adams*, 676 So.2d at 1306 (Appendix).



*Taylor v. Liberty National Life Ins. Co.*, 509 U.S. 906 (1993). Thus, a collateral attack is often the absent class member's only real opportunity to escape a constitutionally defective judgment. Yet that is exactly what the Alabama court's injunction in this case is designed to block. These concerns are heightened where, as here, the court certifies a mandatory non-opt-out class.

Moreover, the order effectively thrusts plaintiff class members into the position of **defendants**, for, like defendants, they bear the risk of liability for damages or worse in the event that they challenge the settlement on jurisdictional grounds and thus disobey the Alabama court.<sup>23</sup> It must also be noted that neither the language nor the reasoning of *Shutts* reaches the circumstance where, as here, absent class members might be subjected to burdens normally imposed on defendants. See *Shutts*, 472 U.S. 810 n.2 and 811 n.3. In sum, without any showing or finding that the absent class members had minimum contacts with the state of Alabama, the Alabama court did not have jurisdiction sufficient to bind plaintiff class members by its injunction.<sup>24</sup>

### CONCLUSION

For all of the above reasons, the Court is urged to find that due process requires that absent plaintiff class members (1) have the right to opt out of the class where they have no minimum contacts with the forum, at least when they have sought or stand to lose any substantial monetary interest; (2) must be given notice that is understandable to lay persons and contains sufficient information to allow such persons to make an

<sup>23</sup> According to *Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967), one may not lawfully challenge an injunction by disobeying it.

<sup>24</sup> See *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d at 769 (at least in absence of opt-out right, absent class member without minimum contacts may not be enjoined from relitigation).

informed decision on whether to retain counsel, opt out, or object; and (3) must have adequate representation, free of conflicts of interest. In addition, the Court should declare that no absent plaintiff class member may be enjoined from challenging the jurisdiction of the forum court in a separate action.

Dated: November 12, 1996

Respectfully submitted,

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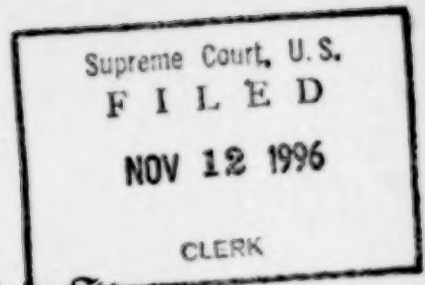
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No. 95-1873



IN THE  
**Supreme Court Of The United States**  
**OCTOBER TERM, 1995**

GUY E. ADAMS, *et al.*,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF ALABAMA

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**BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR  
PUBLIC JUSTICE, P.C., IN SUPPORT OF PETITIONERS**

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## **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. Through this work, TLPJ has become especially concerned about efforts by defendants to create mandatory, "non-opt-out" settlements that deprive victims of their constitutional rights to pursue individual damages litigation. TLPJ submits this brief to urge the Court to reject this tactic and reaffirm that due process requires an opt-out right with respect to any substantial damages claims included in a class action, even where those claims are included in or released by a settlement that also includes some form of injunctive relief.

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<sup>1</sup> Letters of consent to the filing of this brief have been filed with the Clerk.

## STATEMENT

This case arose from a dispute over cancer insurance policies sold by Liberty National Life Insurance Company ("Liberty"). The policies originally provided unlimited coverage for radiation, chemotherapy, and prescription drugs to fight cancer. 2a. However, in late 1986, Liberty began a "cancer policy exchange program" to persuade policyholders to switch to new policies that, according to petitioners, had higher premiums yet contained severe limitations on coverage. 3a.

On May 12, 1992, Charlie Frank Robertson sued Liberty for fraudulently causing loans to be made upon his life insurance policy. He sought compensatory and punitive damages, but no injunctive relief. 3a. On October 1, 1992, Robertson filed an amended complaint and motion for class certification on behalf of approximately 200,000 individuals (including both Alabama residents and residents of four other states) whose old cancer policies had been exchanged for new policies. Like Mr. Robertson's original complaint, the class complaint sought compensatory and punitive damages for fraud. Its only reference to injunctive relief was a clause at the end, following the prayer for damages, seeking "injunctive relief as deemed necessary by the Court." Amended Complaint at 4.

On March 9, 1993, one day before the class was certified, Robertson's counsel filed several individual lawsuits against Liberty on behalf of policyholders seeking compensatory and punitive damages based upon the same cancer policy exchange program at issue in the class action. None of those cases sought any injunctive relief with respect to Liberty; rather, they all exclusively sought compensatory and punitive damages arising out of Liberty's fraudulent conduct.<sup>2</sup>

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<sup>2</sup> See *Robert I. Stewart, et al., v. Liberty National Life Insurance*

The following day, on March 10, 1993, the class was preliminarily certified under Alabama Rule of Civil Procedure 23(b)(2), which -- like its federal counterpart -- does not permit a right to opt out. The class definition specifically *excluded* "any insured, who on or before the date of this class certification order, has filed a separate action against [Liberty] asserting claims arising out of the cancer policies on coverage." Petition at 10 n.7. Because the class definition excluded any pre-filed cases, the individual damages actions filed by class counsel on March 9 were permitted to go forward outside the class.

On June 13, 1993, a proposed settlement was reached that provided monetary relief to a tiny percentage of the class -- *i.e.*, those class members who had contracted cancer and made claims under the new policies. First, those individuals received 100% repayment of their monetary losses resulting from the limitations in their new policies. (This relief was later enhanced to include "an additive of 50% to cover the cost of the loss of use of money and any attendant mental anguish, pain and suffering." 55a.) Second, the cancer victims received "ancillary monetary relief" in the form of what the settlement called "extracontractual" or "punitive" damages placed in two escrowed funds totalling \$4 million. (This relief was later enhanced to include an additional \$7 million. 39a-40a.)

The remainder of the class -- those individuals who had *not* been diagnosed with cancer and therefore had not made claims under their cancer policies -- did not receive any monetary compensation under the proposed settlement. For

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*Co., Barbour County Case No. CV-93-025; James L. Gould, et al., v. Liberty National Life Insurance Co., Barbour County Case No. CV-93-024; Louise Peel v. Liberty National Life Insurance Co., Barbour County [no case number indicated on complaint].*



these class members, there was no provision for repayment of the excess premiums they had paid for their new policies; no provision for reducing those premiums in the future; no compensation for loss of use of their money and any attendant mental anguish, pain, and suffering; and no provision for any "extracontractual" or "punitive" damages. The settlement nonetheless required these individuals to release any pending or future claims for compensatory and punitive damages related to Liberty's cancer policy exchange program. 77a-79a.

The settlement also provided non-monetary relief to both segments of the class. In essence, Liberty agreed to: (1) refrain from instituting any new "cancer policy exchange programs" in the future without full disclosure; (2) reform its cancer policies to eliminate the coverage advantages it obtained through the exchange program (but not to refund or eliminate the premium increases charged class members); and (3) refrain from additional premium increases until a specified date. 10a-11a.

Numerous class members objected to the proposed settlement on the ground, among others, that the class should have been certified under Alabama Rule 23(b)(3), which permits a right to opt-out. In addition to advancing rule-based arguments, the objectors maintained that due process requires an opt-out right in class actions including substantial damages claims, notwithstanding the presence of claims for injunctive relief. The objectors explained that an Alabama jury had awarded over \$1 million in damages to an individual victim of Liberty's exchange program who -- like the vast majority of the class -- had not made any claims under her policy. See 60a (citing *McAllister v. Liberty National*, CV92-4085-RIB).<sup>3</sup> They

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<sup>3</sup> *McAllister* was subsequently affirmed by the Alabama Supreme Court. See *Liberty National Life Ins. Co. v. McAllister*, No. 1931163, 1995 WL 129224 (Ala. Apr. 7, 1995), 136a-151a.

also pointed out that the Alabama Supreme Court had recently held that the payment of additional premiums for a new, less valuable policy issued under Liberty's exchange program constituted damages sufficient to sustain a claim for fraud. See 59a (discussing *Boswell v. Liberty National*, 643 So.2d 580 (1994)). Given that the settlement would release their legally cognizable -- and potentially very substantial -- damages claims, the objectors argued that due process did not permit certification of a mandatory class.

The trial court rejected the objectors' arguments, finding that due process did not require an opt-out right under these circumstances. In its final order approving the settlement on May 26, 1994, the court held that certification under Alabama Rule 23(b)(2) was proper because "the predominant relief provided for in this settlement . . . is equitable relief . . . ." 76a. In so holding, the trial court made no effort to analyze whether the predominant relief sought in the complaint and released by the settlement was for money damages; instead, the court simply looked to the terms of the settlement agreement. See 76a-77a.<sup>4</sup>

Various objectors appealed the approval of the non-opt-out settlement to the Alabama Supreme Court, arguing, among other things, that the mandatory class violated the due process

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<sup>4</sup> The trial court also found that certification was proper under Alabama Rules 23(b)(1)(A) and (B), which -- like their counterparts in the Federal Rules of Civil Procedure -- permit certification of a mandatory class where the prosecutions of separate actions could "establish incompatible standards of conduct for the party opposing the class" or "be dispositive of the interests of the other members not parties to the adjudications or substantially impede or impair their ability to protect their interests." 77a. In so holding, the trial court's principal justification was that permitting individual lawsuits against Liberty could eventually exhaust its available assets, leaving some victims uncompensated. See 72a.

clause of the United States Constitution. The Alabama Supreme Court rejected the challenge, finding that "simply because a . . . class action settlement may ultimately result in an award of damages does not prevent [mandatory] class certification under [Alabama Rule 23]. . . . So long as the relief is *primarily* equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper." 12a (emphasis in original; citation omitted).<sup>5</sup>

## SUMMARY OF ARGUMENT

This case presents the question of whether individuals may be included, against their will, in a class action that releases their substantial damages claims without any monetary compensation simply because the settlement also provides some injunctive relief. Under this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 & n.3 (1985), the answer to this question must certainly be "no."

*Shutts* held that, in "those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments," absent class members have a due process right to opt out of the class. *Id.* at 811, n.3. The Alabama Supreme Court held that *Shutts* does not apply to this case on the theory that the class action is primarily injunctive in nature. In so holding, the court looked solely to the relief provided in the *settlement*, as opposed to the claims alleged in the complaint

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<sup>5</sup> In so holding, the Alabama Supreme Court looked solely to the presence of injunctive relief in the settlement as justifying certification of a mandatory class under Alabama Rule 23(b)(2). It did not address the trial court's holding that mandatory class certification was also proper under other provisions of the Rule due to the alleged risk that individual lawsuits could exhaust Liberty's assets. See n.4, *supra*.

and released in the settlement. This approach makes no sense, since it fails to take into account what claims are being given up as part of the resolution of a class proceeding. The lower court's approach, moreover, invites manipulation of the class action device by defendants seeking to cap their liability in damages cases. If the decision whether a case is "wholly or predominately" for money damages under *Shutts* is solely a function of what the settlement provides, then defendants seeking a unitary disposition of their liability can resolve damages class actions on a non-opt-out basis by insisting on settling them for injunctive relief and little -- or no -- money damages.

To prevent such manipulation of class members' constitutional rights, courts seeking to determine whether a case is "wholly or predominately for money judgments" must focus on the claims asserted in the complaint and those that are released as part of the settlement, rather than on the terms of the settlement agreement itself. In this case, the focus of the class complaint was money damages, and the settlement requires class members to release all their claims for compensatory and punitive damages against Liberty. Despite the breadth of the release, the vast majority of the class will receive *no* monetary compensation as part of the class settlement; all they will receive is injunctive relief of questionable value that was never sought in the complaint and is not being sought in the individual cases that class counsel carved out of the class the day before it was certified on a non-opt-out basis under Alabama Rule 23(b)(2). Under these circumstances, the only logical conclusion is that this action is "wholly or predominately for money judgments" within the meaning of *Shutts*.

Even assuming, *arguendo*, that this case is "primarily" injunctive in nature, the lower court's decision was still in error, since due process requires an opt-out right with respect to substantial damages claims included in a class action seeking



injunctive relief, regardless of the extent of injunctive relief sought or obtained. As a logical matter, it does not make sense to contend that the opt-out right recognized in *Shutts* evaporates simply because a damages claim happens to be coupled with a request for injunctive relief. Moreover, there is no policy justification for permitting mandatory class certification in "hybrid" cases that contain a mixture of injunctive and damages claims. The rationale for permitting mandatory classes -- that class members share an indivisible, unitary interest in common relief -- may exist in regard to the injunctive claims, but it does not exist with regard to the damages claims. Depriving class members of the right to opt out of hybrid cases would also invite abuse of the class action device, since all defendants would have to do to achieve mandatory class certification is to persuade plaintiffs' counsel to couple their damages claims with extensive injunctive relief. For all these reasons, the proper approach in a hybrid case is to permit mandatory class certification with respect to the injunctive relief, but to certify the class on an opt-out basis with respect to the damages claims. Only this approach respects the class members' constitutional rights to pursue their individual damage recoveries in litigation subject to their individual control.

## ARGUMENT

### THE CERTIFICATION OF A MANDATORY CLASS IN THIS CASE VIOLATED THE CLASS MEMBERS' DUE PROCESS RIGHTS TO OPT-OUT.

This case should be viewed against the backdrop of increasing efforts by defendants to use class actions as vehicles for capping their liability in damages cases. Defendants facing liability for wrongful conduct that harmed large numbers of people have a powerful financial interest in preventing their

victims from filing individual lawsuits. A mandatory class is a perfect vehicle towards this end, since it permits a defendant to force all its victims into a one-size-fits-all proceeding and eliminate each potential plaintiff's right to control his or her own case -- *i.e.*, choose his or her own lawyer, decide when and where to sue, and determine whether to try the case or to settle it (and, if so, on what terms).

Historically, class members in federal class actions with substantial damages claims have been protected from mandatory settlements by Fed. R. Civ. P. 23(b)(3), which requires an opt-out right in cases predominately for money damages. See Fed. R. Civ. P. 23, Advisory Committee Notes (1966 Amendment), at 106-07. The constitutional underpinnings of this opt-out right were confirmed by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-13 & n.3 (1985). However, over the past decade, defendants have increasingly attempted to create mandatory classes that strip victims of their right to exclude themselves from class litigation.

One tactic has been to seek certification under Fed. R. Civ. P. 23(b)(1)(B), which permits non-opt-out classes in cases where individual actions would "as a practical matter be dispositive of the interests of the other members not parties." This approach, however, has met with uneven success, because defendants often cannot make the requisite showing of a "limited fund" to justify certification of a non-opt-out class under 23(b)(1)(B) and because the propriety of capping liability via this approach is open to question.<sup>6</sup> To avoid this obstacle,

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<sup>6</sup> Compare *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), petition for reh'g pending (affirming, over vehement dissent, non-opt-out damages class of future asbestos victims under Fed. R. Civ. P. 23(b)(1)(B)) with *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (rejecting non-opt-out damages class of drug victims under Fed. R. Civ. P. 23(b)(1)(B) for failure to demonstrate limited fund). Cf. *In re School Asbestos*



defendants have started to seek mandatory class certification under a different provision of the Rule -- 23(b)(2) -- that applies to cases seeking predominantly injunctive relief.

To shoehorn damages cases into this prong of Rule 23, one approach has been to attempt to trade off class members' damages claims for settlements that consist solely or primarily of injunctive relief. See, e.g., *Brown v. Ticor Title Ins. Co.*, 982 F.2d 383 (9th Cir. 1992), *cert. dismissed as improvident, granted sub nom. Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1292 (1994). Another approach has been to insert injunctive relief into a settlement that also includes substantial damages claims. See, e.g., *Hayden v. Atochem North American Inc.*, Civil Action No. H-92-1054 (S.D. Tex.) (decision whether to approve non-opt-out settlement of present and future personal injury claims pending). Under both approaches, the goal is to deprive class members of their constitutional right to opt out of class actions for damages and control their own cases.

This tactic of creating mandatory classes by coupling damages claims with injunctive relief in class action settlements threatens our most fundamental notions of individual access to justice. This case squarely presents the question of whether this trend should be permitted to continue. The mandatory settlement at issue traded off most class members' substantial damages claims in exchange for injunctive relief of questionable value and *no* monetary compensation. If the Alabama Supreme Court's decision approving the settlement is allowed to stand, then defendants everywhere will be given a green light to use non-opt-out class actions as vehicles for capping their liability

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*Litig.*, 789 F.2d 996 (3d Cir.) (rejecting non-opt-out punitive damages class under Fed. R. Civ. P. 23(b)(1)(B) for failure to include all victims in the class), *cert. denied*, 479 U.S. 852, 915 (1986).

in damages cases. As explained below, this result is flatly at odds with *Shutts* and the U.S. Constitution.

**I. Due Process Requires an Opt-Out Right in this Case Because the Suit Is "Wholly or Predominately" for Money Damages Within the Meaning of *Shutts*.**

In *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 n.3 (1985), this Court held that absent class members have a constitutional right to opt out of a class suit "wholly or predominately for money judgments." The Alabama Supreme Court held that *Shutts* did not apply in this case because the class "*relief is primarily equitable or injunctive*" in nature. 12a (emphasis added). In other words, the court looked solely to the settlement agreement to determine whether damages claims predominate, rather than to all the claims set forth in the complaint and released as part of the settlement. Because the settlement itself contains mostly injunctive relief, the court concluded that no opt-out right was required under *Shutts*.

This approach makes no sense, since it fails to take into account what claims are being given up as part of the resolution of a class proceeding. In cases that proceed to judgment, it is the claims in the complaint that will be barred by the *res judicata* effect of a judgment, regardless of the extent of actual relief granted by the court. In cases that settle, it is the *released* claims that will forever be lost as a result of the class settlement. Without considering these claims, a court cannot realistically assess whether a class action is wholly or predominately for money damages within the meaning of *Shutts*. See generally H. Newberg & A. Conte, 1 *Newberg on Class Actions*, § 12.17 (3d ed. 1992) ("*Newberg*").

The language of *Shutts* itself demonstrates that the proper

focus is on the claims set forth in the complaint and released in the settlement. *Shutts* held that due process requires an opt-out right in any class action that "seek[s] to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3 (emphasis added). The italicized language -- "seek[s] to bind" -- demonstrates that, when deciding whether a class action is predominately for money damages, a court should look at those claims that would be bound by a class judgment. The binding effect of a judgment, of course, must be determined with reference to the complaint and any accompanying release. Thus, contrary to the Alabama Supreme Court's view, the relief provided in the settlement is irrelevant under *Shutts*; rather, it is the "claims" that the case "seeks to bind" that determine whether the case is "wholly or predominately" for money damages.

The lower court's exclusive focus on the settlement agreement also leads to perverse results directly at odds with the rationale of *Shutts*. *Shutts* recognized that due process does not permit absent class members' damages claims to be compromised without their consent. Even though the individual claims at issue in *Shutts* were small, this Court held that due process requires, "at a minimum," notice and a right to opt out of the class. 472 U.S. at 812. Under the Alabama Supreme Court's approach, however, the greater the compromise of the class members' damages claims, the less likely they will be permitted to opt those claims out of the class. Thus, in case where -- as here -- most class members' damages claims are traded off for a settlement that provides injunctive relief and no money damages, there will be no opportunity for class members to exclude themselves from the class. Moreover, under this approach, the substantiality of the damages claims at stake in the litigation becomes irrelevant. Thus, for example, if a class action seeking \$100,000 in damages per class member and insignificant injunctive relief were later settled for some

injunctive relief and no damages, the lower court presumably would hold that no opt-out right exists under *Shutts*. This result is both unjust and nonsensical.

Finally, the lower court's approach invites manipulation and abuse of the class action device. As explained above, defendants faced with a large number of potential damages claims always prefer a mandatory class, and will exploit any opportunity to achieve a non-opt-out deal. If the decision whether a case is "wholly or predominately for money judgments" under *Shutts* -- and, therefore, whether a right to opt out exists -- turns on the terms of the settlement, then defendants will have a readily available means to this end. They will simply offer to settle a damages class action on the condition that it be converted into a mandatory class settlement under Fed. R. Civ. P. 23(b)(2) providing some form of injunctive relief and relatively little (or no) money damages. The defendants will be happy because they will have succeeded in capping their liability on the damages claims. Class counsel will be happy because they will have achieved a settlement that most likely includes a hefty award of attorneys' fees. The class members, however, will not be happy because they will have lost their right to pursue and control their own individual damages claims in exchange for injunctive relief that they may not even want or need.

To avoid this manipulative deprivation of opt-out rights, the only permissible way to determine whether a case is "wholly or predominately" for money damages is to focus on the nature of the claims alleged in the complaint and released by the settlement, rather than on the relief provided by the settlement. If that approach is followed here, it is plain beyond purview that the class members have a constitutional right to opt out under *Shutts*. As explained above, the class complaint in this action sought compensatory and punitive damages for fraud.



The only reference to injunctive relief was a boilerplate clause at the end of the complaint, following the prayer for damages, seeking "injunctive relief as deemed necessary by the Court." Thus, from the outset, the focus of the class litigation was to obtain money damages for the class. It is undisputed, moreover, that such damages claims are cognizable under Alabama law, *see Boswell, supra*, 643 So.2d 580, and could potentially yield substantial verdicts in individual damages actions. *See McAllister, supra*, 1995 WL 129224 (affirming jury verdict against Liberty of over \$1 million). Despite their value, those claims were *released* as part of a class settlement that did not provide a penny in monetary damages to the vast majority of class members.

If any doubt remained as to the true nature of the claims at issue, it would be dispelled by the individual lawsuits filed by class counsel the day before the class was certified on a non-opt-out basis under Alabama Rule 23(b)(2). As explained above, these cases include claims that are identical to those encompassed in the class action. For example, both *Robert I. Steward, et al., v. Liberty National Life Insurance Company*, Barbour County Case No. CV-93-025, and *James L. Gould, et al.*, Barbour County Case No. CV 93-024, include plaintiffs who dropped their old policies and purchased new cancer policies from Liberty as part of the cancer policy exchange program. Although these plaintiffs -- like the majority of class members -- never made any claims under their new policies, they sought compensatory and punitive damages for increased premiums and the pain and suffering they underwent when learning of Liberty's fraudulent conduct. Notably, none of these individual lawsuits sought any form of injunctive relief; instead, they sought purely money damages. Yet the same lawyer who filed those cases sought and obtained approval of a mandatory class settlement involving *identical* claims on the ground that the class action was somehow primarily injunctive

in nature. Under this approach, whether a class member has a right to opt out under *Shutts* has nothing to do with the true nature of claims; rather, it is solely a function of what relief is ultimately obtained in a class settlement. This result is illogical and -- as this case demonstrates -- leads to manifestly unfair results.

It is also worth noting that the injunctive relief provided in the settlement is of questionable value to class members. The first element of injunctive relief is Liberty's promise to refrain from instituting any new "cancer policy exchange programs" without full disclosure. This is nothing more than an agreement by Liberty not to defraud policyholders in the future -- hardly a valuable concession on Liberty's part since, if Liberty were ever to embark on another "exchange program," it would surely claim that it did so without deception. Second, although the settlement includes Liberty's promise to "reform" the class holders' policies to give them the benefits they would have received under their old policies, it does *not* include any provision for repayment of the additional premiums that class members were induced to pay on the new, less valuable policies (or to lower ~~those~~ premiums in the future). Thus, to receive the benefits of the settlement, these individuals must continue paying Liberty an inflated premium for the *same* benefits they received for less money prior to the fraudulent cancer policy exchange program. Finally, Liberty agreed to refrain from additional premium increases (*i.e.*, increases above and beyond the inflated premiums class members are already required to continue paying under the proposed settlement) until one year after final approval by the Alabama Supreme Court. This provision, too, is of dubious value, since Liberty could ultimately recapture the value of these premiums by raising its rates in the future. Thus, the injunctive relief provided in the settlement is of relatively little value to the vast majority of the class.



For all these reasons, when determining whether a class action is "wholly or predominately for money judgments" within the meaning of *Shutts*, the only constitutionally permissible approach is to evaluate the class claims from the perspective of all the relief sought in the complaint and released by the settlement. The contrary approach followed by the Alabama Supreme Court in this case -- looking solely to the relief provided by the settlement -- permits and encourages litigants to create mandatory, "non-opt-out" settlements that include injunctive relief for the sole purpose of depriving victims of their constitutional rights to pursue individual damages litigation. This Court should reaffirm *Shutts* and firmly reject the Alabama Supreme Court's contrary ruling.

**II. Due Process Requires An Opt-Out Right With Respect to Any Substantial Damages Claims Included in a Class Action, Regardless of the Extent of Injunctive Relief Sought in the Complaint or Obtained in a Settlement.**

Even assuming, *arguendo*, that this case is primarily "injunctive" in nature (which it plainly is not), the lower court's decision was still in error because it failed to permit class members to opt their damages claims out of the class. In our view, when a class action seeks to bind or release significant damages claims, due process requires that individuals be permitted to opt those claims out of the class suit, regardless of the extent of injunctive relief sought in the complaint or obtained in a class settlement. This conclusion follows logically from this Court's holding in *Shutts*: if there is a constitutional right to opt out of a class action "seeking to bind plaintiffs concerning claims wholly or predominately for money judgments," then reason dictates that the opt-out right endures even when such damages claims are coupled with claims for injunctive relief. Any other result would elevate form over substance -- that is, an individual's opt-out right in any given

case would depend solely on whether his or her damages claim happened to be accompanied by a request for injunctive relief. If this were the law, then the opt-out right recognized in *Shutts* would be rendered largely meaningless, since requests for significant injunctive relief could easily be added to virtually any class action for damages.

Moreover, there is no policy justification for permitting mandatory class certification in "hybrid" cases that contain a mixture of injunctive and damages claims. It is a fundamental tenet of American law that every individual is entitled to his or her day in court. *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Class actions have been an exception to this principle -- but an exception of limited scope and application only when it is manifest that the due process rights of absent class members will be protected. See generally *Newberg* §§ 1.09-10. To ensure that absent class members' due process rights are protected, mandatory classes have historically been permitted only under very limited circumstances -- *i.e.*, in cases where class members' rights are indivisible and there is a common interest in unitary relief.

A classic example is where a group of stakeholders seek access to a common, limited fund. In such a case, because the stakeholders are all seeking a slice of a single pie, there is a strong practical need for a single outcome. This, of course, is the situation envisioned by Fed. R. Civ. P. 23(b)(1)(B), which permits mandatory class certification in cases where individual actions would "as a practical matter be dispositive of the interests of the other members not parties." A mandatory class is also warranted in a civil rights action seeking injunctive relief concerning, for example, a defendant's promotion practices. In such a case, the injunctive ruling must apply to everyone if there is to be a rule at all, and so there can be no opt-outs from the injunctive aspect of the case. This situation is embodied in Fed. R. Civ. P. 23(b)(2), which permits mandatory class

certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." In both of these examples, mandatory classes are permissible because there is an overwhelming practical need for common relief and class members' rights are truly indivisible. See *Newberg* § 1.22, at 1-51 (these two types of mandatory classes "are analogous to interpleader or quasi-in-rem suits in which *equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected.*") (emphasis added).

This rationale for permitting mandatory classes -- that class members share an indivisible, unitary interest in common relief -- does not exist with respect to claims for damages. Unlike the common fund and injunctive relief cases described above, class actions involving *in personam* claims for damages aggregate individualized claims that present some common factual and legal questions *but are otherwise unrelated*. In such cases, not only is there no practical need for a single outcome, but the inherent heterogeneity of damages claims gives class members an especially strong interest in controlling their own litigation. While a stakeholder with an *in rem* claim against a common fund has a strong interest in remaining *in* the litigation (to ensure that she is served a piece of the pie), a tort victim with inherently individualized damages claims may have an equally strong stake in pursuing her own remedy. See, e.g., *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983) ("[h]eterogeneity, and its attendant potential for diverging interests, necessitated special rules of procedure to protect absent class members of the (b)(3) class"). In recognition of the potential for diverging interests in damages classes, federal Rule 23(b)(3) requires -- and *Shutts* held -- that such classes are only permissible where class members are

given a right to exclude themselves from the litigation.

In this case, the Alabama Supreme Court held that this opt-out right may be abrogated in hybrid cases where damages claims are coupled with substantial injunctive relief. This approach cannot be right, for the simple reason that the mere inclusion of injunctive relief in a case that also seeks money damages does not create the sort of unified interest in a common result that justified the creation of mandatory classes in the first place. Although there may be a practical need for a single outcome with respect to the *injunctive relief* sufficient to justify certification of a mandatory class with respect to *those claims*, there is no reason to deprive class members of the right to exclude their *damages claims* from the case. Thus, the proper approach is to permit mandatory class certification with respect to any injunctive relief sought in a hybrid class action, but to certify the class on an opt-out basis with respect to the damages claims. See, e.g., James W.M. Moore, 3B *Moore's Federal Practice*, ¶ 23.41[5] (Matthew Bender 1993) at 23-296 (where "injunctive relief and damages would be equally appropriate remedies, and both may be obtained, the court should divide the suit into subclasses handled under the separate subdivisions of [Rule 23](b); in many such situations class action treatment may only be necessary for the injunctive aspect, with those individuals suffering actual injury pressing their individual claims for damages in a separate count.") (footnotes omitted).<sup>7</sup>

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<sup>7</sup> Although the Alabama Supreme Court did not specifically address the propriety of the trial court's order certifying a mandatory class under Alabama Rule 23(b)(1)(A) and (B) (see n.5, *supra*), there is no unitary interest in common relief in this case that would justify certification of a mandatory class as to damages, regardless of which provision of Alabama Rule 23 is utilized. The trial court indicated that a non-opt-out class was permissible under Rule 23(b)(1)(A) on the ground that permitting individual lawsuits could "establish incompatible standards of conduct for the party opposing the class."



Here, again, any other approach would invite abuse of the class action device. If this Court were to hold that due process does not require an opt-out right in hybrid class actions where the injunctive claims "predominate," then all defendants would have to do to achieve mandatory class certification is to persuade plaintiffs' counsel to couple their damages claims with a request for substantial injunctive relief. Even if the original complaint did not include such a request, a proposed hybrid settlement could be accompanied by an amended complaint that added claims for injunctive relief. Then, the parties could request mandatory class certification under Fed. R. Civ. P. 23(b)(2) on the ground that the case is primarily injunctive in nature.

This is, for example, precisely what occurred in *Hayden v. Atochem North American Inc.*, Civil Action No. H-92-1054 (S.D. Tex.), which involves a non-opt-out settlement of personal injury and property damage claims of individuals who

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It is well established, however, that the risk of different juries coming to inconsistent results in similar cases as to damages does not provide any basis for mandatory class certification under the identical provision of Federal Rule 23. See, e.g., *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987); *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984). The trial court also certified the class under Rule 23(b)(1)(B) on the theory that permitting individual lawsuits to go forward in the future could eventually exhaust all of Liberty's assets, leaving some victims uncompensated. As petitioners explained in their *cert.* petition, however, this finding was not made until after the fairness hearing regarding the proposed settlement, and the objectors were never given an opportunity to dispute whether there was a limited fund sufficient to justify mandatory class certification under Alabama Rule 23(b)(1)(B). See Petition at 25-26. Putting aside the question of whether Rule 23(b)(1)(B) may ever be used as a vehicle for settling *in personam* damages claims, the absence of any proper evidentiary showing of a limited fund renders the trial court's certification of a mandatory class on this ground inappropriate as a matter of law, see *In re Bendectin*, 749 F.2d at 306, and prohibits any finding that there is a sufficient unitary interest as to damages to justify denial of the class members' constitutional right to opt out.

lived or worked near an agrichemical plant in Bryan, Texas, that spewed arsenic throughout the surrounding community. As originally filed, the case was an opt-out class action under Fed. R. Civ. P. 23(b)(3) for property damages and medical monitoring, and did not include any claims for personal injuries. After several years of litigation, however, the defendants offered to settle the case on the condition that the class be converted into a *mandatory* class action including both property damage and personal injury claims. Mandatory class certification was important to the defendants because it would permit them to cap their liability for future personal injury cases that were likely to arise from the arsenic poisoning. (Several individual personal injury cases had already been filed and settled for millions of dollars.)

The plaintiffs agreed, and filed an amended complaint seeking certification of a mandatory class under Fed. R. Civ. P. 23(b)(2). This mandatory class included not only the property damage claims set forth in the original complaint, but also the past and *future* personal injury claims of some 26,000 individuals who had been exposed to arsenic exposure from the Bryan plant. To justify the conversion from an opt-out to a mandatory class, the parties crafted a proposed settlement that included both monetary recovery and various components of "injunctive" relief, including a promise by defendants to stop producing, using, or handling arsenic at the Bryan facility. Despite the vehement objections of numerous class members who sought to opt out of the case to pursue their own damages claims, the Magistrate-Judge presiding over the case certified the mandatory class and approved a settlement that resolves the current and future damages claims of every class member. If the settlement is permitted to stand, then victims of arsenic poisoning in Bryan, Texas, will be forever barred from



litigating their own personal injury cases.<sup>8</sup>

For all the reasons stated above, this sort of manipulation would become commonplace if this Court holds that due process does not require an opt-out right in hybrid class actions in which requests for injunctive relief "predominate." Any such ruling would be manifestly at odds with *Shutts* and would lack any justification on policy grounds, since hybrid cases do not involve "such equitable circumstances that require a unitary adjudication of related claims to promote strong societal interests and avoid substantial prejudice to class members." *Newberg* § 1.22, at 1-54. The *only* argument that could be offered for depriving class members of the right to opt their damages claims out of hybrid cases is that mandatory classes occasionally help grease the wheels of settlement. This argument is easily answered, however, since no one can assert a legitimate interest in promoting the "efficient" resolution of disputes through procedures that strip litigants of their substantive rights without due process of law.

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<sup>8</sup> The proposed settlement in *Hayden* has not yet received final approval from the District Court Judge presiding over the case. The case has been stayed pending a final decision in the non-opt-out asbestos future personal injury class action recently approved by the Fifth Circuit. See *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), petition for reh'g pending. For a more comprehensive description of *Hayden*, see Coffee, J., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343, 1411-1414 (October 1995) (concluding that, "[u]ltimately, the *Hayden* outcome reflects not only the triumph of defendants over plaintiffs, but also that of present claimants over unrepresented and still unknown future claimants.")

## CONCLUSION

For these reasons, we urge this Court to reverse the decision of the Alabama Supreme Court affirming the trial court's approval of a mandatory class settlement.

Respectfully submitted,

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1996

GUY E. ADAMS, ET AL.

*Petitioners,*

vs.

CHARLIE FRANK ROBERTSON AND  
LIBERTY NATIONAL LIFE INSURANCE COMPANY.

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF ALABAMA

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### **INTEREST OF AMICI CURIAE**

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association.<sup>1</sup> Its more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every state and produce about 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector and more than 18 million employees.

Lawyers for Civil Justice ("LCJ") is a nationwide coalition of defense trial lawyers and corporate counsel sponsored by three national defense bar associations: the Defense Research Institute, the International Association of Defense Counsel, and the Federation of Insurance and Corporate Counsel. LCJ's mission is to work closely with 60 state defense bar associations throughout the United States to restore, promote, and maintain balance in the civil justice system by, among other activities, appearing as *amicus curiae* on important issues affecting the civil justice system and the litigation process.

*Amici's* members frequently are named as defendants in class action lawsuits. We file this brief to articulate the real world costs and complications that acceptance of Petitioners' extreme and unsupported interpretation of the Due Process Clause of the United States Constitution would have on businesses and the judicial system as a whole.

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<sup>1</sup>Counsel for both the Petitioners and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.



## **JURISDICTIONAL STATEMENT**

Petitioners assert jurisdiction under 28 U.S.C. § 1257(a). Pet. Brief at 1. *Amici* respectfully suggest the absence of jurisdiction in this Court for the following reasons:

1. The Alabama Supreme Court decision was based on state court rules of civil procedure and the Alabama Constitution.
2. The question presented by Petitioners in this Court was not presented to or considered by the Alabama Supreme Court.

## **STATEMENT OF THE FACTS**

Charlie Frank Robertson, in his individual capacity, sued Liberty National Life Insurance Company for fraudulent loans against his life insurance policy on May 12, 1992. On October 2, 1992, "the complaint was amended to add new allegations concerning a pattern and practice of fraud that caused approximately 200,000 holders of old cancer policies to exchange their policies for new cancer policies." Pet. App. at 3a. The amended complaint identified Robertson as a class representative and sought equitable and legal relief on a class basis under Alabama Rule of Civil Procedure 23 ("Ala. R. Civ. P. 23"). "Certain policyholders filed objections to their inclusion in the class" and others attempted to file their own class actions, which the trial court stayed. Pet. App. at 4a.

Five months later, on March 10, 1993, the trial court preliminarily certified a class action pursuant to Ala. R. Civ. P. 23(b)(2). Pet. App. at 32a. On April 30, 1993, objectors formally moved to intervene, requesting leave to be excluded from the class action. Petition for a Writ of Certiorari at 10, *Adams v. Robertson*, No. 95-1873 (Ala. 1995). On June 16,

1993, the trial court preliminarily approved a settlement agreement entered into between Liberty National and the class representatives subject to notice to the class and a fairness hearing. *Id.* at 4a. In August of 1993, notice was mailed individually to more than 400,000 policyholders, along with a copy of the proposed settlement agreement, advising them of their opportunity to object and be heard at the fairness hearing. *Id.*

The fairness hearing was held January 20, 1994. Many of the 400 objectors were represented by counsel. Pet. App. at 24a-26a. Prior to the hearing, objectors had participated in limited discovery, had been permitted to depose the actuarial expert for the class and to participate in depositions of representatives of Liberty National's parent company, Torchmark Corporation. Pet. App. at 19a. At the hearing, six of the objectors were permitted to testify in open court, *id.*, and "no objector was denied an opportunity to be heard in person (or, if they chose, by affidavit). . ." *Id.* at 26a. "The parties and objectors also offered voluminous documents and sworn testimony, including depositions, exhibits, and trial testimony." Pet. App. at 25a. On February 4, 1994, the trial court conditionally approved the settlement, and directed some modifications of its terms. On May 19, 1994, the trial court held a final hearing and entered its findings of fact and conclusions of law in an order dated May 26, 1994. The trial court certified the class as one predominantly for equitable relief, and found that Petitioners' claims for money damages were speculative at best. Pet. App. at 5a, 37a. The Alabama Supreme Court affirmed the trial court on December 22, 1995, finding that the class was properly certified as one for predominantly equitable relief; that the relief sought was predominantly equitable, even though some money damages were available as restitution; that the settlement was the result of arms-length bargaining and was fair; and that the Due

Process Clause of the Alabama Constitution did not require the objectors to be given a right to opt-out of the class and did not violate objectors' right to trial by jury. *Adams v. Robertson*, 676 So.2d 1265 (Ala. 1995).

### SUMMARY OF THE ARGUMENT

An ever increasing number of *amici's* members find themselves in the predicament faced by Liberty National in this case. They are confronted, as Liberty National was here, with a state whose liability laws and civil jury tradition encourage extreme, windfall damages verdicts against deep-pocket business defendants who risk going to trial, even in individual cases. Moreover, because it is a convenient mechanism for aggregating unasserted claims, the class action device, interpreted far beyond its logical and intended limits, multiplies exponentially the risk of defending even spurious claims.

The staggering potential liability of going to trial on 400,000 claims in Alabama understandably compelled Liberty National -- and other businesses who find themselves in similar circumstances -- to settle claims that could have been defended on the merits if the risks had not been so high. Given this Hobson's choice, Liberty National chose to settle, rather than fight. However, if as Petitioners contend, class members have a constitutionally mandated right to opt-out of equitable relief class settlements where none now exists -- merely because they claim speculative monetary damages -- defendants' liability would be open-ended and final resolution of such litigation would be difficult, complicated and highly speculative.

### ARGUMENT

#### **I. Important Practical Reasons Militate Against Unlimited Opt-Out Rights In All Types Of Class Actions.**

Federal jurists, academics, and commentators increasingly have recognized that the current class action experiment, started thirty years ago with promulgation of the 1966 Amendments to Federal Rule of Civil Procedure 23 governing class actions,<sup>2</sup> has devolved into a process often resulting in grave injustice and unpredictable outcomes inimical to basic fairness and the efficient use of the civil justice process. See, e.g., *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.), *reh'g en banc denied*, 1996 US App. LEXIS 15416 (3d Cir. June 27, 1996), *cert. granted*, 65 U.S.L.W. 3159 (U.S. Nov. 1, 1996)(No. 96-270); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Systems*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995). Indeed, the problems with class action litigation have fallen on both plaintiffs and defendants alike. See, e.g., John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOKLYN L. REV. 961 (1993).

Acceptance of the rule that Petitioners advance, that Due Process requires a right to opt-out for class members who seek money damages when the predominant class relief is equitable, would eliminate the distinction between the three

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<sup>2</sup>See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969).



different categories of classes, each of which has served a discrete purpose in American class action jurisprudence. Moreover, a brightline rule, such as Petitioners urge, would invite even greater injustice and abuse of an already troubled procedural device.

Businesses have a vital interest in preserving the safety valve that Liberty National chose here -- accept the *quid pro quo* of comprehensive peace as to all members of the class in return for the benefits given to class members in the settlement agreement. Petitioners' call for an absolute right to opt-out, whenever monetary damages are claimed, would undermine one of the primary motivations behind settlements, by making it virtually impossible to reach a comprehensive peace in any type of class action.

As the trial court found here, every class member permitted to opt-out of a class settlement to litigate an individual claim creates a risk that the judgment in the individual litigation will adversely affect the remaining class members and their rights in several respects. Pet. App. at 85a; See George Rutherglen, *Better Late Than Never: Notice and Opt Out At the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258 (1996). The trial court recognized that large non-compensatory damages or punitive damages reduce the amount of money potentially available to resolve the class claims. Even if these windfall verdicts occur in only a few cases, they can total hundreds of millions of dollars. They have the potential not only to diminish the benefits available to the class members, but also to jeopardize the financial viability of the defendant, perhaps forcing it into bankruptcy or putting it out of business altogether.

Here, 400 individuals from a 400,000 member class are attempting to opt-out of the court approved settlement class. To

satisfy the desire of one tenth of one percent of the class to play the litigation lottery, Petitioners would place at risk the very cancer insurance policies that this litigation was brought to protect. If Respondent Liberty National were to suffer million dollar verdicts in individual cases in addition to the millions it already has agreed to pay as part of the settlement, it would be unable to honor its policies at the time the class members may need it most -- when they are struck with cancer. Indeed, that result becomes even more likely if the company were forced into bankruptcy, which *amicus* the Association of Trial Lawyers of America suggests as the outer limit of plaintiffs' Due Process rights to opt-out. *Amicus Curiae* Brief of the Association of Trial Lawyers of America at 4-5, *Adams v. Robertson*, No.95-1873 (Ala. 1995). Society at large should not suffer the economic consequences of lost jobs and erosion of the tax base, merely to satisfy the desire of a few claimants to pursue their own claims.

Another result of permitting individuals to opt-out of class actions predominantly for equitable relief is likely to be a decrease in settlements. One important inducement to settlement is the opportunity to resolve the claims as to all class members at once. Without finality, settlement is not a viable alternative. Indeed, there is no business purpose to support time-consuming and expensive settlement negotiations if, after a settlement is consummated, hundreds of plaintiffs have an opportunity to seek redress through individual jury trials. Furthermore, resolution of these complex, time-consuming cases will be delayed, reducing the ability of the courts to hear new cases waiting outside the courthouse door.

Broad rights to opt-out of class action settlements can and have caused settlement agreements to collapse. See, e.g., Joseph Nocera, *Fatal Litigation, Part II: Dow Corning Succumbs*, FORTUNE, October 30, 1995, at 137, 146. The more



class members who opt-out, the greater the strain on the civil justice process as more claims must be brought to trial.

The above practical reasons apply with particular force to class actions in which the relief is predominantly equitable and reinforce the conclusion that due process does not require unlimited opt-out rights in all types of class actions.

## II. Due Process Does Not Require An Absolute Right To Opt-Out Of A Class Action For Equitable Relief.

To whatever extent Petitioners may properly have raised a question under the Due Process Clause of the United States Constitution for this Court to decide, they have failed to articulate a rationale that would justify transforming a procedural device, such as a class action opt-out mechanism, into a right of constitutional dimension. From an historical perspective, creating a right to opt-out of a class action for equitable relief would be a departure from several centuries of mandatory class action jurisprudence, justified by nothing more than Petitioners' own desire to participate on their own terms in the punitive damages lottery. The money damages they claim, compensatory damages for mental anguish and punitive damages, do not rise independently to the level of individual rights that the Due Process Clause was intended to protect. Finally, the constitutional authority upon which they rest their claim, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), does not support the existence of opt-out rights in class actions predominantly for equitable relief, particularly where in personam jurisdiction is not at issue.

## A. History Does Not Support A Right To Opt-Out of Equitable Class Actions.

Although there is some scholarly disagreement as to the circumstances surrounding and frequency with which courts of equity aggregated claims for group adjudication,<sup>3</sup> the tradition from which the Due Process Clause of the Fourteenth Amendment descended clearly included at least some instances of mandatory justice in the aggregate. Yeazell, *supra* note 3, at 868-871; Kaplan, *supra* note 3, at 358-362.

The mandatory nature of class actions originated in cases involving the adjudication of common rights. Kaplan, *supra* note 3, at 359. In such cases, it was impossible to determine the rights of some without also determining the rights of all and, thus, there was no need or desire to opt-out of the judgment. See Kaplan, *supra* note 3, at 360-362.

Over time a "hybrid" form of class action took hold in which the litigants' rights were several, not common, but an adjudication as to one essentially determined the rights of the others. Kaplan, *supra* note 3, at 377, 381. The relief requested usually was equitable, operating against the conduct of the

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<sup>3</sup>Compare Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COL. L. REV. 866 (1977) (arguing that prior analysis of the history of group adjudication lacked access to key materials and resulted in erroneous conclusion that group adjudication was common) with Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967); Zachariah Chafee, *SOME PROBLEMS OF EQUITY* (1950); and Harry Kalven, Jr. and Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 UNIV. CHI. L. REV. 684 (1941) (all suggesting that various forms of group adjudication were common throughout development of civil justice system).

defendant, and it sometimes included ancillary monetary relief. Yeazell, *supra* note 3, at 890. These hybrid class actions were characterized by the cohesiveness of the class members and their claims against a common opponent. See Yeazell, *supra* note 3, at 868-871. These actions also provided no right for class members to opt-out; it was considered more fair, as a practical matter, to allow all members to participate. Kaplan, *supra* note 3, at 359. Moreover, the mandatory nature of these types of classes created significant efficiencies for the courts when it was possible to conclusively resolve all claims in one proceeding.

In classes for money damages, because the class members' rights were several, courts initially found class actions appropriate only as to class members who affirmatively opted into the litigation. For example, the 1938 Federal Rules of Civil Procedure did not expressly authorize a class action for money damages, as did its 1966 counterpart, but the rule and cases decided under it reflect these concerns. Compare 1937 Advisory Committee Note, Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, U.S. Judicial Conference, reprinted in *FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 96 Pamphlet*, at 94 (West ed. 1996) with 1966 Advisory Committee Note, Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, U.S. Judicial Conference, reprinted in *FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 96 Pamphlet*, at 97 (West ed. 1996). This is the first instance where Due Process appears as an institutional concern in group adjudications, and it arose because of the several nature of the rights being adjudicated. Kaplan, *supra* note 3, at 391-392.

The right to opt-out came into being with the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure. The 1966 amendments changed the default

mechanism for Rule 23(b)(3) classes from one which required class members to opt-in to one that automatically included everyone in the class unless they expressly opted-out. This change was made because the one-way intervention provided under the 1938 version of the Rule was considered unfair to defendants, *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561, 588 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962), and because it was believed that by making inclusion in the class the default position, it would better protect the "little guy." Marvin E. Frankel, *Amended Rule 23 From A Judge's Point of View*, ANTITRUST L. J. 295, 299 (August 19, 1966).

The 1966 federal rulemakers also made significant changes to what was called the hybrid class action, the (b)(2) class in modern parlance. The (b)(2) class was envisioned as a mechanism to resolve equitable group claims against institutions and organizations, primarily discrimination and antitrust cases. Although the relief sought would be predominantly equitable, the rulemakers did anticipate that money damages would be part of many actions. For that reason, the 1966 Advisory Committee Notes expressly authorize claims for money damages in (b)(2) actions so long as the predominant relief is equitable. However, the same 1966 rulemakers concluded that Due Process did not require a right to opt-out of classes where the predominant relief was equitable -- even when money damages were claimed.

**B. Petitioners' Claims For Money Damages Do Not Rise To The Level Of Fundamental Rights.**

In essence, what Petitioners are arguing is that they have a fundamental right to opt-out of a class action whenever money damages have been claimed.<sup>4</sup> However, this Court has been wary of denominating procedural protections as "fundamental rights" guaranteed to every citizen in every court, state or federal, by the Due Process Clause. *See, e.g., Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 127 (1992)(historically, the guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property). Petitioners' assertion of the right independently to pursue in Alabama state courts money damages for mental anguish and punitive damages does not rise to the level of "fundamental rights."

As the trial court found, Petitioners' monetary claims are highly speculative. Pet. App. at 37a. In fact, claims for mental anguish in the absence of physical injury were disfavored in Alabama until relatively recently. *See, e.g., Taylor v. Baptist Medical Center, Inc.*, 400 So.2d 369, 375 (Ala. 1981) (Almon, J., dissenting)(the majority opinion permitting monetary recovery for emotional distress in the

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<sup>4</sup>*Amicus*, the Association of Trial Lawyers of America, invites this Court to find that Petitioners have a right to separate pursuit of their money damages under the Seventh Amendment of the U.S. Constitution. However, this Court has not found that the Seventh Amendment right of trial by jury is applicable to the states, and the decision under review comes from a state court and rests entirely on state law. Since the Alabama Supreme Court did not consider the issue under the U.S. Constitution, and Petitioners failed to raise that issue here, there is no jurisdictional basis for the Court to address the issue. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

absence of physical injury "is a departure from the long standing rule in this jurisdiction"). Furthermore, claims for mental anguish have been rejected as unprecedented by numerous state courts. *See, e.g., 11 A.L.R. 5th 88* (1993)(damages in an action for fraud are generally limited to actual pecuniary loss). Only recently have a few states permitted such damages under any circumstances. *See, e.g., Kilduff v. Adams*, 593 A.2d 478 (Conn. 1991). Thus, it cannot be said that money damages for mental anguish have historical precedent or are part of traditional practice such that Due Process protects them as fundamental rights.

Although punitive damages have a long legal history, a claim for punitive damages is not recognized as a free standing cause of action. *PSG Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659, 663 (9th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); *Evans v. Newport News Shipbuilding and Dry Dock Co.*, 243 F. Supp. 1017 (E.D. Va. 1965), *aff'd* 361 F. 2d 364 (4th Cir. 1966), *cert. denied* 385 U.S. 959 (1966). As this Court recently found, Due Process requires there to be a reasonable relationship between the amount of punitive damages awarded and the conduct that the damages are intended to punish or deter. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1595 (1996). The right to claim punitive damages is derivative of an underlying cause of action and, therefore, is not a fundamental right guaranteed by the due process clause of the Constitution. *See Henderson v. Alabama*, 627 So. 2d 878 (Ala. 1989), *reh'g denied, without op.*, 1993 Ala. LEXIS 1336 (no individual right to punitive damages in Alabama); *see also Gore*, 116 S. Ct. at 1595 (punitive damages intended to advance societal goals of punishment and deterrence, not provide compensation for injuries); *IBEW v. Foust*, 442 U.S. 42, 48 (1979).



**C. *Shutts* Does Not Support Petitioners' Claim.**

Petitioners' Due Process claim relies heavily on this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Petitioners' reliance on *Shutts* is misplaced. In *Shutts*, the question presented was whether a state court had personal jurisdiction over absent, non-citizen members of a putative class action seeking monetary relief. *Id.* at 803-804. This Court found that Due Process required the forum state to provide absent class members with notice and an opportunity to opt-out of the class action before it could exercise personal jurisdiction over them. *Id.* That issue is not presented here.

**CONCLUSION**

For the foregoing reasons, the Writ should be dismissed as improvidently granted, or the judgement should be affirmed.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

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GUY E. ADAMS, *et al.*  
*Petitioners*,  
v.

CHARLIE FRANK ROBERTSON AND LIBERTY  
NATIONAL LIFE INSURANCE COMPANY,  
*Respondents*.

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On Writ of Certiorari to the  
Supreme Court of Alabama

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**BRIEF FOR EXXON CORPORATION AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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**CONSENT OF PARTIES**

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

**INTEREST OF AMICUS CURIAE**

*Amicus curiae* Exxon Corporation is a leading oil company with operations throughout the United States and the world. Exxon is a defendant in *In re Exxon Valdez*, No. A89-0095-



CV (D. Alaska), consolidated litigation arising from the 1989 grounding of the tanker EXXON VALDEZ in Prince William Sound, Alaska. The case is one of the largest in the history of this country, involving five separate compensatory damages classes and thousands of individual claimants. Over more than seven years of proceedings, the district court has issued over 300 pre-trial and post-trial orders, and the Ninth Circuit Court of Appeals has decided or has pending before it more than a dozen appeals.

As part of that litigation, the district court certified a "mandatory" (*i.e.*, no opt-outs allowed) punitive damages class under Federal Rule of Civil Procedure 23(b)(1)(B).<sup>1</sup> The certification made possible the trial of all punitive damages claims arising from the EXXON VALDEZ grounding in a single proceeding and avoided the prospect of multiple punitive damages trials in both federal and state courts by multiple plaintiffs alleging the same misconduct in connection with the same maritime accident. The consolidation of those punitive damages claims into a single, non-opt-out class is a landmark in the sensible and efficient use of mandatory class procedures under Rule 23 in a

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<sup>1</sup> The district court certified the punitive damages class on Exxon's motion. *In re Exxon Valdez*, *supra*, Order No. 204 (D. Alaska Apr. 15, 1994). The Ninth Circuit denied a mandamus petition by certain plaintiffs challenging the certification, *Chugach Alaska Corp. v. United States Dist. Ct.*, No. 94-70174 (9th Cir. Apr. 28, 1994), and dismissed an interlocutory appeal for lack of appellate jurisdiction. *Chugach Alaska Corp. v. Exxon Corp.*, 26 F.3d 130 (9th Cir. 1994) (Table); see *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

manner entirely consistent with the due process rights of class members.<sup>2</sup>

Petitioners in this case and the *amici* trial lawyer organizations ask this Court to endorse a sweeping proposition that due process requires states to afford class members the opportunity to exclude themselves from any class action involving claims "wholly or predominantly" for money damages. See Pet. Br. at 20-21. In Exxon's view, petitioners and the trial lawyers seriously misread this Court's prior cases — especially *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) — and urge upon the Court an overbroad principle that would wrongly cast doubt on the legitimate and beneficial use of mandatory class actions in cases such as *Exxon Valdez*. Exxon accordingly urges the Court to decline the invitation to issue new constitutional pronouncements broader than necessary to decide the issues truly presented by this case.

### SUMMARY OF ARGUMENT

1. The law has long approved mandatory joinder of competing monetary claims against a "limited fund." Federal Rule of Civil Procedure 23(b)(1)(B) expressly recognizes this principle, authorizing certification of

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<sup>2</sup> The class punitive damages trial resulted in a punitive award of \$5,000,000,000 on which the district court, upon conclusion of further proceedings culminating in settlement of all remaining claims for compensatory damages, has recently entered judgment. As of this writing, Exxon's appeal of the merits of the punitive award awaits the district court's decision on a pending motion to amend the form of the judgment under Federal Rule of Civil Procedure 59(e).

mandatory classes where allowing individual litigation would risk foreclosing or impairing the claims of similarly situated claimants not parties to the adjudication. In recent years, courts have invoked this provision to certify mandatory classes in mass tort and other multiple claim cases where litigation of initial claimants' compensatory damage claims would deplete a defendant's resources before later claimants could be satisfied. In the punitive damages context, courts have extended the principle to cases where the first tried claims would likely exhaust legal limits on the amount of punitive damages that could be awarded. In both situations, the mandatory class procedure enables equitable disposition of similarly situated claims against a "limited fund," akin to interpleader and analogous equitable proceedings. In the punitive damages context, mandatory certification also affords courts, in appropriate cases, a means to address the vexing problem of seriatim multiple punishment for the same course of conduct.

2. *Shutts* does not hold such certification unconstitutional. The due process issue in *Shutts* was purely jurisdictional: whether a state could constitutionally bind absent class members not otherwise subject to personal jurisdiction within the state. The Court held that a state could do so if it afforded such class members a reasonable opportunity to opt out in addition to the class action due process requirements of notice, an opportunity to be heard and adequate representation by a named plaintiff. For due process purposes, the failure to opt out after constitutionally sufficient notice could be deemed the equivalent of consent to personal jurisdiction if it was otherwise lacking. *See* 472 U.S. at 806-14. By the same token, *Shutts* neither holds nor implies that due process requires an independent right to opt

out when personal jurisdiction is otherwise present. On the contrary, the Court emphasized, consistent with its earlier cases, that the interests of class members properly subject to personal jurisdiction are sufficiently protected by the requirements of adequate representation and notice of the opportunity to object or to participate in the litigation. Finally, *Shutts* did not speak at all to the situation involving competing claims to a limited fund (in the punitive damages context or otherwise). The Court expressly declined to address the due process requirements for binding absent class members in class actions seeking equitable relief, and it recognized that the case before it did not involve a limited fund. *Id.* at 811 n.3, 820.

3. Given a proper reading of *Shutts*, Exxon agrees with respondents that on this record, the judgment below can be affirmed on the ground that the objecting class members have waived any jurisdictional objection by affirmatively litigating the merits of the proposed class settlement. However, if the Court is not inclined to dispose of the case on that ground, Exxon would urge the Court to avoid making any ruling that would cast doubt on the validity of mandatory classes — including mandatory punitive damages classes — in cases involving competing claims against a limited fund. While the trial court below nominally (and belatedly) invoked Alabama Rule 23(b)(1)(B) as a secondary ground for certification, the court's primary ground, and the primary ground discussed on appeal in the Alabama Supreme Court, was that the class settlement, though it compromised claims for money damages, provided only injunctive relief and equitable restitution, and was therefore subject to mandatory class treatment under Alabama Rule 23(b)(2). The core issue in the case is whether the compromise of



such claims obviates any due process opt-out right that would otherwise apply under *Shutts*. If the Court holds, as it should, that due process does not forbid a non-opt-out class under Alabama Rule 23(b)(2), the case simply does not present the question whether due process requires an opt-out opportunity in the context of claims against a limited fund.

### ARGUMENT

#### I. MANDATORY CLASSES SERVE IMPORTANT AND LEGITIMATE PURPOSES IN CASES INVOLVING COMPETING MONETARY CLAIMS AGAINST A LIMITED FUND

##### 1. The Equitable Underpinnings of Limited Fund Class Actions

The modern-day mandatory class action has its roots in the seventeenth century English "bill of peace," a mandatory joinder device used in the chancery courts to bind entire classes of similarly situated claimants. See *In re Asbestos Litig.*, 90 F.3d 963, 986 (5th Cir. 1996); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 40-41 (1986); Zechariah Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932). Courts in this country have recognized mandatory class actions at least since *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), a case in which representatives of a plaintiff class of Methodist ministers sued to vindicate rights in a common fund. This Court upheld the suit on the ground that in cases involving a "common interest or a common right," a "court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all

of them the same as if all were before the court." *Id.* at 302-03.

In the ensuing 140 years, this Court consistently recognized the binding effect of traditional class action judgments, provided that absent class members received adequate representation. *E.g.*, *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938). In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Court acknowledged that a "class" or "representative" suit was a "recognized exception" to the general rule that an *in personam* judgment can have no binding effect on persons not parties to the proceeding. *Id.* at 40; see also *Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (both reaffirming *Hansberry*).

None of these cases recognized or even suggested a due process right to opt out of a traditional class action. See 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.09 (1992) (describing "limited fund and other no opt-out class actions" recognized under former Equity Rule 38 (adopted in 1912)). Rather, as set forth in *Hansberry*, the critical precondition for binding absent class members in this type of class action was adequacy of representation. 311 U.S. at 42-43. Other cases suggest that due process also generally requires reasonable notice of the nature of the proceeding and the opportunity to object or participate,<sup>3</sup> but

<sup>3</sup> See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).



none suggests a general due process right to opt out where the requisites of a traditional equitable class action are present.

The modern "opt-out" class action is of much more recent vintage, having as its precursor the so-called "spurious" class action first recognized in Rule 23 of the original Federal Rules of Civil Procedure adopted in 1938. This was in essence a permissive joinder device, designed as a vehicle to facilitate simultaneous adjudication of actions at law involving common issues, binding only to the extent that absent class members affirmatively opted *into* the class. *Newberg on Class Actions*, *supra*, §1.09. The 1966 amendments, which introduced the current federal rules, retained this device under Rule 23(b)(3), but substituted an opt-out procedure for the opt-in procedure provided in the 1938 rules.

Significantly, both the 1938 rules and the 1966 amendments also retained the traditional equitable non-opt-out class actions recognized at common law. The modern versions of these procedures are contained in Rules 23(b)(1) and (b)(2). As discussed in the next section, the traditional limited fund class action is specifically encompassed in Rule 23(b)(1)(B), the provision under which the District Court in Alaska certified the mandatory punitive damages class in *Exxon Valdez*.

## 2. Modern Cases under Rule 23(b)(1)(B)

Rule 23(b)(1)(B) expressly authorizes certification of mandatory (*i.e.*, non-opt-out classes) where:

The prosecution of separate actions ... would create a risk of ... adjudications with respect to the individual

members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(B).

This subsection "takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter." *Advisory Committee's Note to Proposed Amendments to Rule 23*, 39 F.R.D. 69, 100-01 (1966). The Advisory Committee contemplated specifically that this rule would apply in cases of competing monetary claims against a limited fund:

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by . . . representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.

*Id.* at 101.<sup>4</sup>

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<sup>4</sup> See also Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 45 (1977) ("The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . and there is a risk that if litigants are allowed to

As noted above, courts have applied the rule in a variety of contexts, including mass torts where the record establishes a substantial risk that individual actions by early claimants will so deplete the defendants' resources as to prejudice recoveries by later claimants. See, e.g., *In re Asbestos Litig.*, 90 F.3d at 982-87; *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 982 F.2d 721, 739 (2d Cir. 1992); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1418 (E.D.N.Y. 1989); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977).<sup>5</sup>

In such cases, mandatory class certification under Rule 23(b)(1)(B) prevents the "unseemly race to the court room door with monetary prizes for a few winners and worthless judgments for the rest." *Coburn*, 77 F.R.D. at 45. Indeed, even courts skeptical of certifying mass tort class actions under other provisions of Rule 23 have recognized the value of such certification where the requisite limited fund truly

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proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers").

<sup>5</sup> Other courts, while holding open the possibility of such certification on a proper showing, have denied certification under Rule 23(b)(1)(B) on the ground that the record did not establish the requisite limited fund. E.g., *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305-06 (6th Cir. 1984); *Jenkins v. Raymark Indus. Inc.*, 109 F.R.D. 269, 276-77 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

exists.<sup>6</sup> Instead, "[l]imited-fund class actions effect a pro-rata reduction of all claims in order to treat all claimants fairly. Thus, they sound in equity even though the relief they provide necessarily affects the amount of money damages the claimants can ultimately receive." *In re Asbestos Litig.*, 90 F.3d at 986. The procedure closely resembles actions for interpleader, or on the filing of a final account of a trustee or executor, as to which it is well established that absent parties may be bound without the right to opt out. *Id.* at 987; *In re Joint Eastern & Southern Dist. Asbestos Litig. (Findley)*, 878 F. Supp. 473, 478 (E. & S.D.N.Y. 1995), *aff'd in part and vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996); cf. *Mellane*, 339 U.S. at 311-13.

As also noted above, courts have extended this principle to punitive damages in multiple claims situations where the record supports a conclusion that the first tried claims could exhaust legal limits on the aggregate amount of punitive damages for a single tort. The rationale was well articulated by Judge Weinstein, who certified such a class in the "Agent Orange" tort litigation:

There must be . . . some limit, either as a matter of policy or as a matter of due process, to the amount of

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<sup>6</sup> See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir.) (declining to establish high threshold for commonality of issues required under Rule 23(a)(2) in context of putative Rule 23(b)(3) class action because it "might have repercussions for class actions very different from this case, such as a Rule 23(b)(1)(B) limited fund class action, in which the action presented claimants with their only chance at recovery"), *cert. granted*, 117 S. Ct. 379 (1996).

times defendants may be punished for a single transaction . . . . At the very least, a trial court passing on future claims may admit evidence as to the payment to prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same conduct . . . . There is, therefore, a substantial probability that "adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." Accordingly, a class of all [claimants] . . . [is] certified under [Rule 23](b)(1)(B) . . . for the award of punitive damages.

*In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (quoting Fed. R. Civ. P. 23(b)(1)(B)), *mandamus denied sub nom. In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (2d Cir. 1984).

This Court, of course, has recently issued a series of decisions confirming that due process indeed limits the amount of permissible punitive damages. *See BMW of North Am., Inc. v. Gore*, 116 S. Ct. 1589, 1592 (1996); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Class treatment of punitive damages claims is tailor-made for cases like *Exxon Valdez* in which huge numbers of claimants seek punitive damages for the same allegedly wrongful conduct. Mandatory certification in such cases protects not only the interests of plaintiffs seeking to share in the same pool of potential punitive damages, but also the

interests of the defendant and society as a whole in avoiding multiple punishments for the same acts. The latter concern has vexed courts, while eluding any solution, since the early days of mass torts. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-42 (2d Cir. 1967) (Friendly, J.) (warning of danger of punitive damages "overkill" in mass tort cases); *Dunn v. HOVIC*, 1 F.3d 1371, 1385-91 (3d Cir. 1993) (discussing concerns expressed about repetitive punitive awards in asbestos cases); *In re School Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir. 1986) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts").

## II. NEITHER *SHUTTS* NOR ANY OTHER DECISION OF THIS COURT SUPPORTS THE CREATION OF AN ABSOLUTE OPT-OUT RIGHT IN CLASS ACTIONS INVOLVING MONETARY CLAIMS

Petitioners' claim that due process requires a right to opt out of any class involving claims "wholly or predominantly" for money damages finds no support in this Court's due process jurisprudence. As respondents correctly point out, petitioners read far too much into *Shutts*, which concerns not the right to opt out generally, but rather the requirements for binding class members over whom a forum state has no independent basis for asserting personal jurisdiction. On the jurisdictional point, Exxon can add little to analysis



respondents have already given.<sup>7</sup> The *Shutts* reasoning has no applicability to cases where class members have minimum contacts with the forum (as was indisputably the case in *Exxon Valdez*),<sup>8</sup> where they have expressly or impliedly

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<sup>7</sup> It bears note, however, that the *Shutts* opinion discusses jurisdictional constraints in the context of *state* court class actions only. Federal courts often have broader jurisdictional reach than the courts of the states in which they sit, as when Congress has enacted statutes authorizing nationwide service of process. See *United States v. Union Pacific R.R.*, 98 U.S. 569, 603-04 (1878) ("nothing in the Constitution ... forbids Congress to enact that ... any [federal trial court] ... shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision"); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 442 (1946); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (federal court's jurisdiction to adjudicate federal securities claims extended to all persons with minimum contacts with the United States). Likewise, in cases involving pre-trial transfers under 28 U.S.C. § 1407, the federal multidistrict litigation statute, courts have held that a multidistrict transferee court may constitutionally exercise jurisdiction, for pre-trial purposes including settlement, over all persons having minimum contacts with any transferor forum. See *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1434-35 (2d Cir. 1993); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987). But see *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (applying *Shutts* in context of mandatory settlement class certified by § 1407 transferee court; no discussion of possibility of jurisdiction based on class member's minimum contacts with transferor forum), *cert. dismissed*, 511 U.S. 117 (1994).

<sup>8</sup> See *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir. 1994).

waived any jurisdictional objection,<sup>9</sup> or where they are otherwise subject to the forum court's jurisdiction.<sup>10</sup>

It bears emphasis, moreover, that *Shutts* expressly declined to extend its jurisdictional holding to class actions seeking "equitable relief," 472 U.S. at 811 n.3, and that the case concededly did not involve a limited fund. See *id.* at 820 ("there is no specific identifiable *res* in Kansas, nor is there any limited amount which may be depleted before every plaintiff is compensated").<sup>11</sup> More recent cases, analogizing Rule 23(b)(1)(B) limited fund class actions to their equitable antecedents, have concluded that *Shutts* does not mandate an opt-out right in such actions.<sup>12</sup>

Respondents are similarly correct in their conclusion that no due process right to opt out may be implied under the

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<sup>9</sup> See *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175-76 (8th Cir. 1995); *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 292.

<sup>10</sup> See *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996) (*quasi in rem* jurisdiction over beneficiaries of a trust created in the forum state).

<sup>11</sup> The same is true of the other principal cases on which petitioners and the *amici* supporting their position rely. See, e.g., *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983) (applying *Shutts* in non-limited fund case certified under Rule 23(b)(2)); *Brown*, 982 F.2d at 389 & n.2 (applying *Shutts* in non-limited fund case certified under Rules 23(b)(1)(A) and 23(b)(2), but *not* 23(b)(1)(B)).

<sup>12</sup> See *In re Asbestos Litig.*, 90 F.3d at 987; *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. at 714.

three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioners' *Mathews* argument is especially weak in the context of limited fund class actions certified under Rule 23(b)(1)(B). To the extent the rule impairs any property interest of any given claimant, it does so only to the extent necessary to prevent impairment of the property interest of other, equally deserving claimants. Under the third *Mathews* factor, the "burdens" that petitioners' proposed opt-out right "would entail" would fall directly on later claimants, making for a compelling case against allowing such opt-outs.<sup>13</sup>

Petitioner's argument is still weaker in the context of *punitive* damages claims, which do not raise a "private interest" — the first *Mathews* factor — at all. Punitive damages vindicate not private interests but the quintessentially sovereign right of the public to punish and deter misconduct. They are "fundamentally collective," *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995), and "are awarded for the public benefit — the collective good." *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996). "[T]he state and not the victim is considered the true party plaintiff." *Id.* A punitive

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<sup>13</sup> It bears noting as well that petitioner's proposed opt-out right would do little, if anything, to ameliorate the alleged problems of class action "abuse" discussed in the briefs filed by the *amici* trial lawyer organizations. The potential for such abuse exists equally in both opt-out and non-opt-out class actions. The solution is not to eliminate the useful tool of non-opt-out class actions — thereby throwing out the baby with the bathwater — but rather, as the *amici* state attorneys general suggest, to enforce diligently the existing requirements of notice and adequate representation. These safeguards apply to *all* class actions and — unlike the proposed opt-out right — are directly responsive to the perceived abuses.

damage claim is therefore never a *private* claim; rather, a plaintiff who seeks punitive damages acts, by definition, as a "private attorney general" to protect a "public interest." For this reason the state has been held to have the power to eliminate punitive damages claims altogether. *In re Paris Air Crash*, 622 F. 2d 1315, 1319-20 (9th Cir. 1980) (Kennedy, J.). As the court said:

[T]he wrongful death statute allows full compensation for loss of companionship and financial support. Plaintiffs seek in addition . . . the opportunity to act as private attorneys general to effect the deterrence and retribution functions of [the state's punitive damage law]. *So far is this right from being a fundamental personal right that it is an interest not truly personal in nature. It is rather a public interest . . . .*

*Id.* (emphasis added); see also *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct").

### III. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO CONSIDER THE CONSTITUTIONALITY OF LIMITED FUND MANDATORY CLASSES

Given a proper reading of *Shutts*, the Court could affirm the judgment below on any of a number of alternative grounds. As respondents point out, to the extent that any of the objecting class members lacked minimum contacts with the Alabama forum, they waived any jurisdictional objection

by affirmatively litigating the merits of the class settlement (*see* cases cited in note 9 *supra*). Likewise, Exxon agrees with respondents that the inclusion of monetary relief applicable to a small number of injured claimants in a settlement providing predominantly equitable and injunctive relief does not disqualify the settlement class from certification under Rule 23(b)(2), and does not require a right to opt out. Whether the Court agrees or disagrees with these grounds, however, Exxon respectfully urges it to avoid any decision that would cast doubt on the validity of mandatory classes — including mandatory punitive damage classes — in cases involving competing claims against a limited fund.

Although the trial court in this case nominally invoked Alabama Rule 23(b)(1)(B) as a secondary ground for certification, the parties have all but ignored it in their respective presentations to this Court. Petitioners' position appears to be that certification under Rule 23(b)(1)(B) was both procedurally and factually improper (Pet. Br. at 30 & n.15). If that is so, this case plainly is *not* an appropriate case for review of the constitutionality of a true limited fund class action. The parties have focused their dispute on whether due process requires the right to opt out when putative claims for money damages are compromised in a class settlement certified under Rule 23(b)(2) on the ground that it provides predominantly injunctive relief and equitable restitution. If the court holds, as it should, that due process does not forbid a non-opt-out class in such circumstances, there is no need to reach the question whether due process requires an opt-out opportunity in the context of claims against a limited fund. And the unquestioned utility of the limited fund class action in the management of major

litigation provides an excellent reason why the Court should *not* reach out beyond what this case requires, and should avoid casting doubt on the viability of such actions.

### CONCLUSION

For all the reasons stated above, *amicus curiae* Exxon Corporation respectfully urges the Court to affirm the judgment below.

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No. 95-1873

Supreme Court, U.S.

FILED

DEC 9 1996

**In the Supreme Court of the United States**

OCTOBER TERM, 1996

GUY Y. ADAMS, ET AL.,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and  
LIBERTY NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

On Writ of Certiorari to the  
Supreme Court of Alabama

**BRIEF FOR THE AMERICAN COUNCIL OF  
LIFE INSURANCE AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

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**BRIEF FOR THE AMERICAN COUNCIL OF  
LIFE INSURANCE AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

**INTEREST OF THE AMICUS CURIAE**

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States. ACLI represents the interests of 580 member life insurance companies.<sup>1</sup> Many of ACLI's members have been subjected to putative and certified nationwide class actions, particularly in Alabama. Because class action litigation can have devastating consequences for defendants in such cases, this Court's resolution of issues such as the one presented in this case is of critical importance to ACLI and its members.<sup>2</sup>

**SUMMARY OF THE ARGUMENT**

1. It is important at the outset to clarify what issues this case does and does not present. Because every one of the petitioners either is an Alabama resident or consented to the jurisdiction of the Alabama courts by participating (either personally or through counsel) in the fairness hearing, this case does not present the important question whether a state court may exercise jurisdiction over the claims of out-of-state members of a putative class who have not received actual notice and an opportunity to opt out. Because Liberty National is an Alabama company, the case also does not present the question whether an Alabama court has personal jurisdiction over out-of-state defendants with respect to claims of out-of-state class members. Finally, because the case

<sup>1</sup> Respondent Liberty National Life Insurance Company ("Liberty National") is a member of ACLI. This amicus brief has been prepared solely by counsel retained by ACLI at ACLI's expense. Liberty National has not contributed in any substantial way to the preparation of this brief.

<sup>2</sup> The petitioners and both respondents have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

involves a settlement, it presents no issue of the constitutional limitations on the *adjudication* of nationwide class actions.

2. The narrow issue that *is* before the Court is whether members of a nationwide class over whom a State court has personal jurisdiction nonetheless have an absolute due process right to opt out of the class and thereby scuttle a settlement that is supported by the overwhelming majority of the members of the class and that has been approved by the trial court after a plenary fairness hearing. Application of this Court's three-part balancing test compels the conclusion that they have no such right.

First, petitioners' only constitutionally cognizable interest is in their cause of action as a whole, not in any particular remedy. The non-opt-out procedure utilized in this case has not deprived petitioners of that interest because the settlement provides them and every other member of the class with very substantial equitable relief.

Second, even if petitioners could be said to have a property interest in specific remedies, such as punitive damages or compensation for mental anguish, the risk of *erroneous* deprivation of that interest is minimal in light of the extensive procedural safeguards that petitioners were afforded — actual notice of the settlement and the opportunity to participate in discovery, file briefs, and to give testimony and cross-examine witnesses at the fairness hearing.

Third, the interests of the remaining 99.9% of the class and of Liberty National are substantial and easily outweigh those of the 0.1% of class members who seek to opt out. If petitioners are allowed to opt out and thus to pursue individual claims for millions of dollars in punitive and mental anguish damages, there is every likelihood that the settlement will be terminated and that every class member will have to fend for himself or herself. And whether or not that happens, it would take only a few large punitive and/or mental anguish awards to disable Liberty National financially and thereby

deprive the remaining class members of *any* relief at all. Nothing in the Due Process Clause requires the Alabama courts to countenance that dire result.

### ARGUMENT

Nationwide class actions filed in state court represent a relatively new and challenging phenomenon. Such cases implicate a variety of significant constitutional issues ranging from personal jurisdiction to procedural due process to constitutional limitations on choice of law. As the present case comes to the Court, however, it raises only the comparatively narrow issue of whether members of a nationwide class over whom the State court has personal jurisdiction have a due process right to opt out of the class, thereby destroying what has been adjudicated to be a fair settlement of the class action, merely because the class members' claims are potentially remediable by a money judgment.

In Section A of this brief, we briefly set out some of the more significant constitutional issues that are *not* presented here and urge the Court to tailor its opinion so as not to intimate any position as to the appropriate resolution of those issues. In Section B, we discuss the considerations relevant to the Court's determination as to whether the Due Process Clause requires a State to afford individuals over whom it has jurisdiction an opportunity to opt out of a lawsuit that will bind their financial interests. It is our submission that, when, as here, there has been a settlement and a plenary fairness hearing, the State is not constitutionally required to allow such individuals to put their individual preferences ahead of those of the class as a whole and the defendant by opting out of the class and thereby jeopardizing the settlement.



**A. The Court Should Refrain From Intimating A View On The Several Significant Questions That Recur In Nationwide Class Actions But That Are Not Squarely Presented Here.**

Nationwide class actions in state courts present a wide range of significant constitutional issues from the perspective of both the defendants and the members of the class. Most of those issues are not squarely presented here. In this Section of the brief, we briefly identify some of the key constitutional issues that have been percolating in the state courts and respectfully urge the Court to tailor its opinion so as not to intimate any predisposition of those issues.

**1. Personal jurisdiction over out-of-state class members.**

Under our federal system, a State only has power to adjudicate *in personam* legal disputes when *both* the plaintiff and the defendant have some connection with the State, such as residence, voluntary selection of the forum or "minimum contacts" with the State. Applying this overarching principle, the Court has held that a State court has the power to adjudicate the claims of non-residents who otherwise have no particular contact with the State, *if* those individuals effectively consent to the foreign forum's adjudication of their rights. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-814 (1985).

In *Shutts*, each putative class member was personally sent "a fully descriptive notice" of the class action and was given the opportunity to opt out. 472 U.S. at 812. The final class excluded all individuals who opted out as well as all individuals whose notices had been returned as undeliverable. *Id.* at 801. In view of these circumstances, the Court found it appropriate to infer that the remaining out-of-state class members had consented to the State court's jurisdiction, thus entitling the State court to adjudicate their claims. *Id.* at 812-813.

Because all of the persons ultimately included in the class received actual notice, the *Shutts* Court did not need to address the question whether "publication notice" ever can suffice to confer jurisdiction over out-of-state class members.<sup>3</sup> The answer to that constitutional question is of great importance, particularly given the recent dramatic increase in the number of nationwide class actions filed in State courts. See generally 3 HERBERT B. NEWBERG AND ALBA CONTE, NEWBERG ON CLASS ACTIONS § 13.46, at 13-120 (3d ed. 1992) (noting increasing number of state court class actions); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (same). We urge the Court to consider and decide that issue when it arises in a case that actually presents it.

This, however, is not such a case. The petitioners in this case either (a) are Alabama residents as to whom the Alabama courts unquestionably have *in personam* jurisdiction and/or (b) consented to jurisdiction by appearing in the trial court to object to the settlement. Thus, the State has clear power to design a procedural structure that binds their interests. Accordingly, there is no occasion here to decide whether (or under what circumstances) a State court may bind out-of-state class members who have not consented to the court's jurisdiction by appearing on the merits.

**2. Personal jurisdiction over out-of-state defendants with respect to claims of out-of-state class members.** With increasing frequency, lawyers are filing nationwide class

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<sup>3</sup> This issue directly affects both the putative class members and the target defendants. The absence of actual consent to the foreign forum's assertion of adjudicatory power may equip the out-of-state "class member" with the right to renounce as ineffectual any determination in that forum in favor of the defendant. *Shutts*, 472 U.S. at 805. By contrast, the putative class member could invoke a finding of liability rendered against the defendant. Thus, the issue is whether the Due Process Clause licenses the individual States to create a system of "heads, I win; tails, you lose" and to impose it on out-of-State corporate defendants.

actions in State courts against out-of-state defendants that do not have a sufficient presence in the State to afford the State courts with general jurisdiction over the defendant.<sup>4</sup> The state court may have specific jurisdiction with respect to the claims of the in-state class members because, for example, the defendant's conduct affected them within the State.

An entirely distinct question is whether the court may exercise jurisdiction with respect to the claims of the out-of-state class members merely because the class lawyers want to aggregate those claims with those of the in-State plaintiffs. Particularly when the in-state class members represent only a small fraction of the total class, there is considerable reason to question whether the state courts constitutionally may exercise jurisdiction over the defendant with respect to the claims of the out-of-state class members.<sup>5</sup>

This issue, of course, is not presented here, and the Court therefore need not address it, because Liberty National is an Alabama-based company over which the Alabama courts have general jurisdiction.

3. *Constitutional limitations on the adjudication of nationwide class actions.* Another important question that arises in nationwide class actions is whether there are constitutional limits on the kinds of cases that can be tried as class actions. In recent years, the federal circuits have been recognizing rather consistently that nationwide classes of

<sup>4</sup> For a discussion of the difference between general and specific jurisdiction, see *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 & nn. 8, 9 (1984).

<sup>5</sup> One such case that may be familiar to the Court is *Wilkinson v. BMW of North America, Inc.*, a putative nationwide class action seeking compensatory and punitive damages against BMW for the same conduct involved in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). The case was filed in Alabama state court even though Alabama residents comprise less than 1% of the putative class.

product liability and/or consumer claimants are simply unmanageable and cannot fairly be tried in that form. See, e.g., *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), cert. granted on other issues, 117 S. Ct. 379 (1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

With increasing regularity, however, State courts have been certifying nationwide class actions, even though the applicable laws of the different states vary in material ways and the effort to adjudicate claims of tens of thousands of putative class members under 51 legal systems cannot be achieved in any rational or manageable way. See, e.g., *Ex parte Masonite Corp.*, 1996 WL 359888, at \*8 (Ala. June 28, 1996) (refusing to set aside trial court's "preliminary" certification of a nationwide class of property owners and its order setting for trial the issue whether the defendant's home-siding product was defective).

The question then arises whether the fact that the case will have to be tried under myriad (and often conflicting) state laws renders the case so unmanageable and inherently confusing as to make it fundamentally unfair to require the defendant to litigate it in a single proceeding. That issue does not arise here because this case involves a settlement; when there is a settlement, there is no risk of confusing a jury with varying state laws.



**B. The Due Process Clause Does Not Require A State To Exalt The Interests Of A Handful Of Objectors Who Are Otherwise Subject to the State Court's Jurisdiction Over The Broader Interests Of The Settling Class Members And Defendant.**

The issue that is presented here is whether and to what extent dissenting members of a class (or, to be more accurate, their lawyers) can scuttle a settlement deemed by the reviewing courts to be in the best interests of the class as a whole by insisting on the right to opt out of the class. It is an unavoidable side effect of class action litigation that the lawyer(s) designated as class counsel will capture the lion's share of the fee award, which often can run into the millions of dollars. Regrettably, lawyers who have failed to reap the prized designation of class counsel often later seek to protect their own interests at the expense of the class either by directly challenging the settlement or by rounding up class members to opt out of the class, thereby threatening the settlement indirectly.<sup>6</sup> That is obviously what has happened here. Nothing in this Court's Due Process Clause jurisprudence requires the State courts to allow the selfish interests of a few class members and their attorneys to prevail over the interests of the class as a whole.

The Court's test for determining whether a proposed procedure is required by the Due Process Clause requires a balancing of three factors:

[1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

<sup>6</sup> For an entertaining description of one such effort, see Amy Stevens, *The Mouthpieces: Class-Action Lawyers Brawl over Big Fees in Milli Vanilli Fraud*, WALL ST. J., Oct. 24, 1991, at A1. See also *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 690-691 (N.D. Cal. 1990).

substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). For cases like this one involving disputes between private parties, the third factor has been modified to afford "principal attention" to the interests of the private parties opposing the proposed procedure. *Connecticut v. Doe*, 501 U.S. 1, 11 (1991).

Application of this three-part test compels the conclusion that class members who are properly subject to a State court's *in personam* jurisdiction need not be afforded the opportunity to opt out of a class action settlement that has been approved by a trial court as fair after a plenary hearing and then reviewed and approved by a state appellate court.

1. *Petitioners' interest.* The first *Mathews* factor requires identification of the petitioners' interest. Petitioners assume (Br. 23) that they have a property interest in each of the multiple remedies that is potentially available for any conceivable claim that might be alleged against Liberty National arising out of the policy exchange program. We submit that they have no constitutionally cognizable property interest in any particular remedy but rather solely in their cause of action *as a whole*. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause") (emphasis added). Put another way, petitioners' property interest is in the overall remedial bundle, not in each particular stick in that bundle.

Indeed, a holding that each potentially available remedy is a discrete species of constitutionally protectible property would likely encourage constitutional challenges to numerous state court procedures and remedial regimes. For example, under the workers' compensation laws of most states, a



worker may not recover punitive damages or damages for pain and suffering from his or her employer; nor even is the worker entitled to the amount of damages that a jury might conclude to be fair compensation for the injury. Instead, the worker is limited to recovering from the workers' compensation fund an amount that is specified by statute or regulation in accordance with the nature of the injury.<sup>7</sup> If petitioners' approach were adopted, it is predictable that such regimes would be challenged on the ground that they deprive workers entirely of some potentially available remedies and sharply limit the scope of others. Nor can there be any serious doubt that such an approach would give rise to a spate of constitutional challenges to State statutes that limit punitive damages to the first prevailing plaintiff,<sup>8</sup> cap the amount of non-economic and/or punitive damages,<sup>9</sup> or allocate part of any

<sup>7</sup> See generally DAN B. DOBBS, *TORTS AND COMPENSATION* 870-874 (2d ed. 1993).

<sup>8</sup> See, e.g., GA. CODE ANN. § 51-12-5.1(e)(1).

<sup>9</sup> See, e.g., COLO. REV. STAT. ANN. § 13-21-102(1)(a) (punitive damages cannot exceed amount of compensatory damages); CONN. GEN. STAT. ANN. § 52-240(b) (punitive damages in product liability action cannot exceed twice the compensatory damages); GA. CODE ANN. § 51-12-5.1(g) (in non-products liability cases, punitive damages limited to \$250,000 unless defendant acted with specific intent to injure); ILL. COMP. STAT. ANN. ch. 735, § 5/2-1115.1(a) (capping non-economic damages at \$500,000 per plaintiff); *id.* § 5/2-1115.05(a) (capping punitive damages at three times the economic damages); IND. CODE ANN. § 34-4-34-4 (punitive damages may not exceed greater of \$50,000 or three times compensatory damages); KAN. STAT. ANN. § 60-3702(e) (as a general rule, punitive damages may not exceed lesser of defendant's annual gross income or \$5 million); MD. CODE ANN. [CTS. & JUD. PROCEEDINGS] § 11-108(b) (capping noneconomic damages in personal injury and wrongful death actions at \$500,000 subject to annual increases of \$15,000); NEV. REV. STAT. ANN. § 42.005(1)(a), (b) (subject to enumerated exceptions, capping punitive damages at \$300,000 if compensatory damages are less than \$100,000 and at three times the compensatory damages if the

punitive award to the State.<sup>10</sup>

Even if it were appropriate to treat each individual stick in the remedial bundle as an independent species of property, the remedies that petitioners have been required to forego pursuing merit little weight in the constitutional analysis. It requires only the most modest familiarity with Alabama's legal climate to divine that the remedial stick about which petitioners are primarily concerned is punitive damages. As this Court is aware from *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), and the four other Alabama

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compensatory damages are \$100,000 or greater); N.J. STAT. ANN. § 2A:15-5.14b (punitive damages may not exceed greater of \$350,000 or five times compensatory damages); N.D. CENT. CODE § 32-03.2-11(4) (punitive damages may not exceed the greater of twice the compensatory damages or \$250,000); OKLA. STAT. ANN. tit. 23, § 9.1(B)-(D) (punitive damages capped at greater of \$100,000 or compensatory damages unless defendant acted intentionally and maliciously, in which case the punitive damages are capped at the greatest of \$500,000, twice the compensatory damages, or the benefit to the defendant); OR. REV. STAT. § 18.560(1) (\$500,000 limit on non-economic damages in personal injury cases); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (punitive damages limited to greater of \$200,000 or twice the economic damages plus an amount equal to the non-economic damages (subject to a limit of \$750,000)); VA. CODE ANN. § 8.01-38.1 (punitive damages awarded against all defendants may not exceed \$350,000).

<sup>10</sup> See, e.g., FLA. STAT. ANN. § 768.73(2)(a)-(b) (35% of punitive damages allocated to the State); GA. CODE ANN. § 51-12-5.1(e)(2) (75% of punitive damages allocated to the State); ILL. COMP. STAT. ANN. ch. 735, § 5/2-1207 (authorizing court to apportion punitive damages between plaintiff and the State); IND. CODE ANN. § 34-4-34-6 (75% of punitive damages allocated to the State); IOWA CODE ANN. § 668A.1(2)(b) (under specified circumstances, 75% of punitive damages allocated to the State); KAN. STAT. ANN. § 60-3402(e) (50% of punitive damages in medical malpractice cases allocated to the State); MO. ANN. STAT. § 537.675(2) (50% of punitive damages allocated to the State); OR. REV. STAT. § 18.540(b) (60% of punitive damages allocated to the State); UTAH CODE ANN. § 78-18-1(3) (50% of punitive damages in excess of \$20,000 allocated to the State).

cases that it remanded for further consideration in light of *Gore*,<sup>11</sup> Alabama has a well deserved reputation as the home of multimillion dollar punitive damages verdicts. Indeed, a single claim for less than \$1,000 against Liberty National arising out of the policy exchange program yielded the plaintiff and her lawyers (one of whom is counsel of record for petitioners) an appetite-whetting \$1 million in punitive damages. See *Liberty Nat'l Life Ins. Co. v. McAllister*, 675 So. 2d 1292 (Ala.), cert. dismissed, 116 S. Ct. 688 (1995). In short, as the trial court correctly perceived, it is the prospect of pursuing a few more big punitive hits, rather than any concern about the overall fairness of the settlement, that has motivated petitioners to demand the opportunity to opt out. Pet. App. 51a, 55a, 68a, 77a, 86a.

It is well established, however, that there is no right to punitive damages under Alabama law. See, e.g., *Life Ins. Co. of Ga. v. Johnson*, 1996 WL 202543, at \*14 (Ala. Apr. 26, 1996), cert. granted, vacated, and remanded on other grounds, 117 S. Ct. 288 (1996); *Ex parte Corder*, 134 So. 130, 131 (Ala. 1931); *Meighan v. Birmingham Terminal Co.*, 51 So. 775, 777-778 (Ala. 1910); *Comer v. Age-Herald Pub. Co.*, 44 So. 673, 675 (Ala. 1907). Accordingly, the fact that the settlement prevents petitioners from seeking punitive damages is not worth a feather's weight in the constitutional analysis.

Petitioners' highly speculative claims for mental anguish are only minimally more weighty. Mental anguish damages are potentially available in every tort case and hence potentially available in every class action sounding in tort. If the potential of obtaining such damages were entitled to substantial weight in the balancing analysis, then every non-opt-out

<sup>11</sup> *Life Ins. Co. of Ga. v. Johnson*, 117 S. Ct. 288 (1996); *Union Sec. Life Ins. Co. v. Crocker*, 116 S. Ct. 1872 (1996); *American Pioneer Life Ins. Co. v. Williamson*, 116 S. Ct. 1872 (1996); *Ford Motor Co. v. Sperau*, 116 S. Ct. 1843 (1996).

class action sounding in tort would be vulnerable to constitutional challenge. For example, discrimination cases often are settled as non-opt-out class actions in which the relief is predominantly or exclusively equitable in nature. Yet because most victims of discrimination suffer mental anguish, petitioners' approach would make such non-opt-out settlements impossible no matter how advantageous the equitable relief afforded in the settlement may be. It would, in short, constitute a sea change in the law of class actions to hold that the potential availability of damages for mental anguish is a sufficiently weighty property interest to warrant superimposing an opt-out requirement on top of the other safeguards available in class actions.

The only remaining monetary damage that petitioners claim to have suffered is an increase in premiums. However, that damage is, if anything, more speculative than the mental anguish damages because Liberty National had every right to adjust its premiums to loss experience even if the petitioners had not exchanged policies. In any event, as the Alabama Supreme Court found, the equitable relief in this case more than makes up for the premium increases. Pet. App. 15a-16a. As a result of the settlement, every member of the class has received a "best-of-both-worlds" policy at a premium that reflects only the risk of the new policy (with its capped benefits), not that of the older policies. *Id.* at 69a (trial court finding). Moreover, that premium has been frozen since June 1993 and likely will remain frozen until a year after this case is finally resolved (see *id.* at 53a) — i.e., sometime in the spring or summer of 1998. When, as here, the value of the equitable relief exceeds the potentially recoverable monetary damages, any property interest there may be in a monetary remedy is of minimal weight in the constitutional balancing.

2. *The risk of erroneous deprivation.* However petitioners' property interest is defined, the risk of erroneous deprivation of that interest is exceedingly low in view of the procedures that petitioners have been afforded. To begin



with, petitioners received actual notice of the settlement. Pet. App. 43a-45a. That notice informed them of their right to file written objections to the settlement, to testify and call witnesses at the fairness hearing, and to cross-examine the witnesses called by class counsel and Liberty National. *Id.* at 44a-45a. Petitioners took full advantage of those opportunities. *Id.* at 19a, 24a-26a, 47a-48a. In addition, the trial court provided a plenary fairness hearing, after which the court required that additional relief be added to the already generous settlement package. *Id.* at 52a-54a. Finally, the trial court made detailed findings of fact and conclusions of law that facilitated appellate review of its order certifying the class and approving the settlement. *Id.* at 21a-92a.

Given these procedural safeguards, there is no basis for concluding that the failure to afford petitioners an opportunity to opt out engendered any significant risk that they would suffer an *erroneous* deprivation of their property interests. Rather, the fairness hearing has determined that all class members will receive at least fair value for their claims.

Indeed, precisely because of the aggregation of their claims with those of the rest of the class of 400,000 policyholders, petitioners received relief that they never could have won in an individual litigation. See Pet. App. 69a (noting that the "best-of-both-worlds" reformed policy "is not generally available for purchase in the marketplace"); *id.* at 79a (noting that the relief afforded the class could not be obtained without a broad release).

3. *Respondents' interests.* The interests of Liberty National and of the class as a whole in the non-opt-out procedure utilized in this case are overwhelming. There can be no question that Liberty National has a strong interest in the non-opt-out procedure utilized in this case. Although expensive, the settlement in this case affords Liberty National closure and with it the confidence that it will be able to continue serving its millions of policyholders. By contrast, as the trial court found, allowing petitioners to opt out so that

they may each pursue damages claims against Liberty National could well jeopardize Liberty National's financial viability. Pet. App. 72a-73a.

The hundreds of thousands of class members who have not sought to opt out also have a powerful interest in preventing the petitioners from opting out. With virtually no effort on their own part, the members of the class have realized tremendous benefits as a result of the settlement, including a reformed policy that gives them the benefits of both the old policy and the new policy at an artificially low price that has remained fixed since mid-1993 and cannot be increased until a year after the Court decides this case.

On the other hand, if petitioners are permitted to opt out, the settlement will be dead. Every class member will be left to fend for himself or herself. Some might ultimately litigate and lose; some might conclude that litigating is not worth the time or money; and a few lucky ones may strike it rich. However, as the trial court found in determining that the class should be certified under Ala. R. Civ. P. 23(b)(1)(B), *all other class members* — indeed, all other Liberty National insureds — would be at grave risk not only of receiving no remedy, but also of having their insurer rendered financially unable to pay their claims. Pet. App. 72a-73a, 77a, 86a.

All it would take is a few Alabama-sized punitive damages awards to put Liberty National in financial jeopardy. Moreover, even if the Alabama courts could be counted on to enforce some limitation on the amount of punitive damages, Alabama juries are notoriously "generous" in the amount of mental anguish damages they award. The Alabama courts impose only modest restraints on such awards.<sup>12</sup> If even a

<sup>12</sup> See, e.g., *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897 (Ala. 1995) (cutting in half mental anguish awards of \$4 million, \$2 million, and \$1 million in case involving wrongful denial of commissions); *Sperau v. Ford Motor Co.*, 674 So. 2d 24 (Ala. 1995) (jury rendered mental anguish awards of \$2.5 million and \$1 million, which trial court ordered



tiny fraction of Liberty National policyholders were to sue and win, the kind of mental anguish damages that could be awarded could undermine Liberty National's financial viability, thereby depriving every other member of the class of *any* remedy.<sup>13</sup>

As the trial court found, permitting opt outs "is not in the best interests of the Class." Pet. App. 77a. Such a procedure "would create a risk of a race to the courthouse by those permitted to opt-out in an effort to obtain for themselves alone the entirety of the constitutionally permissible punitive recovery in one or a few individual actions, and would result in the Settlement being declared a nullity, thereby depriving all class members of the substantial benefits offered by the settlement." *Ibid.* See also *id.* at 68a, 85a.

\* \* \* \* \*

In sum, as the trial court recognized, petitioners' interest in opting out so as to join Alabama's punitive damages lottery is a matter of "greed." Pet. App. 55a. Given the trial court's finding that the non-opt-out settlement in this case benefits the overwhelming majority of the members of the class, and given the State's personal jurisdiction over the small group of claimants seeking to opt out, the Due Process Clause does not require the State to give those few greedy class members the power to scuttle an otherwise fair settlement by opting out.

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reduced to \$500,000 and \$200,000, in case involving failure to disclose that minority-owned dealerships are less profitable, on average, than white-owned dealerships), cert. granted, vacated, and remanded on other grounds, 116 S. Ct. 1843 (1996).

<sup>13</sup> Unlike punitive damages, mental anguish damages are not subject to any kind of multiple punishment argument. Every plaintiff who sues and wins may be awarded mental anguish damages no matter how many previous plaintiffs have racked up similar awards.

## CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted.

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In The  
**Supreme Court of the United States**  
October Term, 1996

— ♦ —  
GUY E. ADAMS, et al.,

*Petitioners,*

v.

CHARLIE FRANK ROBERTSON and  
LIBERTY NATIONAL INSURANCE COMPANY,

*Respondents.*

— ♦ —  
On Writ Of Certiorari  
To The Supreme Court Of Alabama  
— ♦ —

BRIEF OF AMICUS CURIAE, STATE OF ALABAMA,  
IN SUPPORT OF RESPONDENTS  
— ♦ —

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## INTERESTS OF THE AMICUS CURIAE

Several states have filed a brief that addresses concerns about the potential abuses of class action settlements, but those states, "do not take a position on the merits of the underlying dispute before the Court." (Brief for states of New York, et al., at 1.) Because this dispute arose in Alabama, the Attorney General of Alabama believes it is necessary to comment on the merits of this dispute. Although the Attorney General of Alabama shares the concerns expressed by the other states, this Brief will explain why this Court should not reverse the judgment of the Supreme Court of Alabama.

The State of Alabama has three substantial interests in this case. The first interest is consumer protection. State attorneys general have a special role in the enforcement of consumer protection laws. The Attorney General of Alabama routinely monitors class action settlements in consumer cases, intervenes in many of those cases, and objects to settlements that are contrary to the best interests of class members and other consumers. The Attorney General of Alabama recognizes, however, that settlements of class actions can provide, in appropriate cases, superior relief for complaints of consumers and, therefore, should not be discarded entirely.

The second interest is the traditional role of the States in the regulation of insurance. See *Wilburn Boat v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 316 (1955) ("The control of all types of insurance companies and contracts has been primarily a state function since the states came into being."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). This case involves a defendant insurance company sued

in its home state of Alabama, under the laws of that state. More than ninety-eight percent of the petitioners are residents of Alabama, and more class members reside there than in any other state. The regulation of the conduct of the defendant insurance company is primarily the job of the State of Alabama. A major departure from settled notions of the state processes available to resolve disputes between insureds and insurers could frustrate the regulatory schemes of several states.

The third interest of the State of Alabama is the preservation of our federalism. States have a vital interest in ensuring that the interpretation of state rules of civil procedure by state courts remains a state, not a federal, concern. As this Court has explained, "The Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution are reserved to the States, respectively, or to the people.' U.S. Const., Amdt. 10. The states thus retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

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#### STATEMENT OF THE CASE

The issue in this case arises in the context of complaints that Liberty National Life Insurance Company fraudulently induced holders of a cancer insurance policy to switch to a new policy that allegedly resulted in narrower coverage for cancer patients. Liberty National contended that the complaints are without foundation and that the vast majority of its customers received better coverage under the new policies. The parties entered into

settlement discussions that the trial court found were "conducted at arms-length, without collusion," and agreed to a settlement that the court found to be "the result of hard and intense bargaining by able counsel on both sides." Pet. App. 34a, 36a.

Under that settlement, Liberty National agreed, *inter alia*, to reform its cancer policies to eliminate the new limitations on coverage that had been imposed under the new policy, provide restitution of 100 percent of the loss of benefits to cancer victims, and create two funds, totaling \$4 million, to cover expenses incurred by class members in connection with treatment that would have been covered under the former policy. As an integral part of the settlement, members of the class were provided notice and an opportunity to be heard but could not opt out of the settlement, if the court approved the settlement.

Approximately one-quarter of one percent of the 400,000 class members objected to the proposed settlement. After an extensive fairness hearing, the trial court approved the settlement on the condition that the restitution be increased to 150 percent of loss, that the funds established to cover expenses be increased to \$11 million, and that an agreed upon freeze on premium increases be extended. Those modifications were accepted and the settlement was approved.

With respect to the issue presented by the petitioners – approval of the class without an opt-out provision – the trial court expressly found that an opt out "would be detrimental to the interests of the class members and the class as a whole" in the light of the "inherent conflicts that would ensue between class members and individual

punitive damage suits if opt-outs were permitted." Pet. App. 85a. Specifically, the court found that "[i]f opt-out were permitted, a few class members who opt-out, if successful in their individual lawsuits, could receive an early trial and would no doubt attempt to recover punitive damages for the entire pattern and practice of conduct here, to the detriment of the remaining class members." Pet. App. 86a. Such a result, the court found, is not required by the Constitution "and is neither desirable nor appropriate." Pet. App. 85a-86a.

On appeal, the Alabama Supreme Court rejected the claims of the objecting class members that they were entitled to an opportunity to opt out of the settlement class. That a class action under Alabama Rule of Civil Procedure 23(b)(1) or 23(b)(2) "may ultimately result in money damages does not prevent class certification," the Court held, concluding that "so long as the relief sought is primarily equitable or injunctive, a class action settlement that also includes money damages with a non-opt-out provision is proper." Pet. App. 12a (emphasis in original) (citing *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert denied*, 115 S. Ct. 2569 (1995)). The Alabama Supreme Court further determined that the relief awarded in this case was primarily equitable in nature, because the most significant relief was reformation of the insurance contracts and an injunction preventing Liberty National from switching insurance policies without providing certain information. Accordingly, the court held that the absence of an opt-out procedure in this case did not render the certification and settlement unconstitutional.

As to fairness of the terms of the settlement itself – which is not at issue before this Court – the Alabama Supreme Court found that the trial court had not abused its discretion in approving the settlement and that it had given due consideration to the appropriate factors, including the likelihood of success at trial, the range of possible recovery, the complexity, expense and duration of the litigation, the substance and amount of opposition to the settlement, the stage of the proceedings at which the settlement was reached, and the financial ability of Liberty National to withstand judgments in the absence of a settlement. Pet. App. 17a.

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#### SUMMARY OF ARGUMENT

This case involves a settlement that primarily reformed the cancer insurance policies of approximately 400,000 policyholders who were allegedly defrauded by an Alabama insurance company. Although the petitioners – more than ninety-eight percent of whom are from Alabama – note that the plaintiff's attorney and the lower courts have a reputation regarding large punitive damages, the petitioner's main objection is that the class settlement deprives them of the opportunity to pursue that speculative but potentially lucrative remedy. The Due Process Clause of the Fourteenth Amendment does not guarantee the right to participate in a punitive damages lottery in which compensation may be denied to most of those injured in a mass tort case.

There are three important state interests at stake here. The first interest is consumer protection. This Court



should not deprive consumers of the ability to obtain broad and meaningful relief through the use of mandatory classes in appropriate cases. The second interest is federalism. This Court should defer to the reasonable determination of the Supreme Court of Alabama that this settlement provides primarily equitable relief. That deference is particularly appropriate in this case where more members of the plaintiff class reside in Alabama than in any other state and the defendant is an Alabama insurance company. The third interest is in preserving the settled law regarding Federal Rule of Civil Procedure 23 and the state rules that follow that model. That interest is especially strong in this insurance case, because insurance regulation is traditionally the province of the states. Alabama law extends to policyholders and insurers a procedure borrowed from the federal courts to resolve disputes in a manner that affords substantial relief to every policyholder. That procedure also promotes judicial economy in immeasurable ways.

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### ARGUMENT

This case is not what it may first appear to be. Although this case arose in the Circuit Court of Barbour County, Alabama, which, as the petitioners note, has a reputation for frequent and large punitive damages awards, the settlement of this case does not conform to that reputation. This case involves a settlement that primarily reformed the cancer insurance policies of approximately 400,000 policyholders who were allegedly defrauded by an Alabama insurance company. The petitioners – more than ninety-eight percent of whom are

Alabama residents – are a vocal but tiny fraction of those policyholders who object to the settlement, because they want to pursue speculative but potentially lucrative legal remedies, particularly punitive damages. The petitioners are not advocates of civil justice reform: The petitioners cast aspersions toward the reputation of the lower courts and the national reputation of the plaintiff's attorney, but the petitioners' real objection is that they have been denied the opportunity to participate in a system where large punitive damages may be awarded to a few and compensation may be denied to most members of the plaintiff class.

This Court, of course, should never shirk its duty of enforcing the fourteenth amendment and ensuring that due process is afforded by every state to every citizen. There may be instances in which class actions are settled in a manner that raises substantial issues regarding due process. This Court should be vigilant in its review of potentially abusive class actions. This Brief will explain, however, some of the reasons why this case does not warrant the intervention of this Court.

This Argument is divided into three parts. Part one addresses the propriety of using a mandatory class action to protect consumer interests. Part two addresses the federalist concern that this Court should defer to the determination of the state courts regarding the primary nature of the relief in a class action settlement. Part three addresses the need to preserve settled notions of the propriety of mandatory class actions, particularly as they relate to the traditional role of the states in regulating insurance.

**I. The Ability to Settle Litigation Through the Use of Mandatory Classes, in Some Cases, is Necessary to Protect Consumer Interests.**

The issue in this case has significant implications for all parties interested in the just and efficient resolution of otherwise unwieldy and cumbersome public interest litigation. During the past several decades, our legal system has seen an explosion in the incidence of mass tort litigation and in other litigation involving the individual claims of, in some instances, hundreds of thousands of individuals. These claims may involve product liability disputes, civil rights violations, or anticompetitive practices, just to name a few. At the same time, however, the number and the scope of claims involved in these disputes threaten to overwhelm the legal system and to delay indefinitely the resolution of claims that plainly should be redressed. Although sound public policy demands that those who are injured by massive fraud or negligence have the opportunity to pursue their claims, it likewise demands that there be some mechanism for gaining final, binding, and effective relief, and ensuring that the interests of all those injured – not just a select few – are protected. In many, if not most, cases fitting under this rubric, the class action is an appropriate and fair mechanism for securing justice.

The interests of consumers provide support not only for proceeding through the mechanism of a class action but for the swift and efficient resolution of these disputes through settlement. To achieve settlements in these circumstances, the absence of an opt-out provision may be a fundamental prerequisite. Unless a defendant facing hundreds or thousands of claims can know with certainty

that all of those claims will be resolved, there is little or no incentive to enter into far-reaching settlements with most of the class. Especially in this time of large punitive damage awards, the presence of even a handful of remaining litigants offers a sufficiently ominous future liability potential that there is little to be gained from resolving even a large majority of claims. If the Supreme Court rules that an opt out is required in all circumstances, therefore, multiple individual lawsuits will be the order of the day.

A regime in which multiple individual lawsuits are the means to resolve mass tort or fraud claims, however, can be inherently unjust to most of the alleged victims of those actions. Although the first plaintiffs in the door may well fare better than under a class settlement by securing massive punitive damage awards, they do so at the expense of the majority of the members of the class, for whom nothing will be left once the first few plaintiffs take all available funds. Plaintiffs securing large punitive damage awards will be much more than compensated for any injury, while many others suffering the same injury will be left with nothing. Furthermore, the multiplication of litigation itself will only increase the likelihood of unjust results. No public policy interest of which we are aware is served by such an arbitrary regime, and those state officials charged with responsibility for consumer protection have a keen interest in preventing such a result.

This Court should be mindful of the utility of mandatory classes and the damage that would be wrought if settlements involving such classes could be undone by an



unhappy few seeking the windfall of large punitive damage awards and attorneys' fees without regard to the interests of other class members or the public policies served by class action settlements. If the petitioners in this case had been permitted to opt out and pursue individual compensatory and punitive damages claims, the settlement may not have occurred, the policies may not have been reformed, and the restitutionary remedies may not have been offered, all to the detriment of the class as a whole. The Supreme Court should preserve the continuing ability of class representatives and defendants to work out mutually beneficial solutions in the best interests of the class as a whole and reject petitioners' effort to deprive the legal system of the ability to facilitate such results.

**II. The Supreme Court Should Defer to the Determination of the Alabama Supreme Court that the Relief Provided Under State Law was Primarily Equitable.**

As the matter has been presented in the petition (see, e.g., Pet. at 21), and as the Supreme Court framed it in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the key question is whether the relief at issue in this state law cause of action arising in state court was wholly or predominantly a money judgment. While the Court in *Shutts* determined that – at least as a matter of personal jurisdiction in that case – an opt-out requirement was an element of due process, it expressly limited its holding to “those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments,” and “intimate[d] no view concerning other types of class actions, such as those seeking equitable relief.”

*Shutts*, 472 U.S. at 811 n.3. In this case, following the lead of *Shutts*, the Alabama Supreme Court determined that the relief was primarily equitable or injunctive and, therefore, a mandatory class settlement was proper.

In asking this Court to reverse the judgment, the petitioners have asked this Court to override a state supreme court's characterization of the relief approved in a state law action as equitable or legal in nature. That question, however, is and should be primarily one for the state supreme court. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.”). The interests of the States as participants in our federal system require that state institutions – such as the Alabama Supreme Court – determine the appropriate meaning, content, and characterization of state law.

This class action plainly should have been brought in Alabama. More members of the plaintiff class reside in Alabama than in any other state, and more than ninety-eight percent of the petitioners reside in Alabama. The defendant is an Alabama insurance company regulated under Alabama law. This case is not the archetypical abusive class action brought by less than able representatives in a forum that is too distant for the vast majority of the members of the plaintiff class and has only a remote connection with the defendant. Indeed, the plaintiff's attorney has a national reputation for securing generous awards for his clients, particularly in the trial court where this case was filed.



In any event, the characterization of the primary relief as equitable was reasonable and should not be disturbed. The plaintiffs in this litigation complained that they had been fraudulently induced to switch their cancer insurance to new policies providing less comprehensive coverage. As part of the settlement, the defendant agreed to a reformation by which the earlier coverage was restored. That reformation resolved the central issue in the dispute for the vast majority of members of the class, who had made no claims under any cancer policy. Reformation, of course, is an equitable remedy that does not involve monetary relief. To be sure, for some members of the class, a restitutionary remedy accompanied the reformation, while others were entitled to receive monetary relief from one of the damages funds. But the presence of some monetary relief for some members of the class does not undermine the obvious conclusion that the nonmonetary restitutionary remedy was entirely sufficient to meet the primary complaint that the new cancer policy provided reduced coverage.

**III. The Supreme Court Should Not Upset the Settled Determinations Reflected in the Federal Rules of Civil Procedure and in State Procedural Rules Modeled on the Federal Rules that an Opt-Out is Not Required, or Beneficial, in all Class Actions.**

The rule urged by petitioners would undo the carefully crafted and considered judgments of Rule 23 of the Federal Rules of Civil Procedure and the many state class action rules modeled on the Federal Rules. Under those rules, only classes certified pursuant to Rule 23(b)(3) must provide an opt-out right. The petitioners, however,

would have the Court rewrite those rules through constitutional fiat by requiring as a matter of the Due Process Clause that a great many more classes be accompanied by an opt-out right. If the Court imposes an opt-out requirement where the rules do not presently call for such an option, the settled and tested distinctions found in Rule 23 would be erased and the utility of class actions would be reduced in areas where they are arguably needed most.

This Court has long recognized that a judgment in a class action may bind absent members of the class so long as the class members were adequately represented. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). In the settlement context, due process may also require notice and an opportunity to be heard. The Supreme Court of Alabama found that these traditional requirements were satisfied in this case.

This Court in *Shutts* made clear its reluctance to "require the invalidation of . . . the class action provision[s] of the Federal Rules of Civil Procedure." 472 U.S. at 813. Those provisions were crafted with the benefit of the considered judgment of their drafters and have been tested over time in hundreds of cases. Judicial economy in both state and federal courts has been advanced enormously by the use of class actions. In the interests of comity and federalism, this Court should be all the more reluctant to invalidate state procedural rules patterned on the federal model.

This is particularly true in the context of an insurance case. Regulation of insurer practices and protection of the interests of insureds has traditionally been the province

of state insurance commissioners, who are cognizant of local needs and conditions and have considerable experience in the area. This is not to say that court actions that might affect insurer practices and solvency are preempted, but the predominant role of state regulation strongly suggests that state law procedures should not be displaced in a manner that seriously undermines the state regulatory system. See *Wilburn Boat v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 316 (1955) ("The control of all types of insurance companies and contracts has been primarily a state function since the states came into being."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Here Alabama law provides policyholders and insurers a means of resolving a dispute such as the present one in a manner that affords real relief to every class member, while affording finality and certainty to the insurer concerning its obligations. Petitioners' position would deny that option as a matter of federal law, jeopardizing the interests of insured and insurer alike and the interests of all states in promoting judicial economy. State officials have a keen interest in resisting such an unsettling intrusion, which threatens to disrupt carefully crafted regulatory and judicial regimes.

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## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Supreme Court of Alabama.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States** CLERK

OCTOBER TERM, 1996

GUY E. ADAMS, *et al.*,

*Petitioners,*

—v.—

CHARLIE FRANK ROBERTSON and  
LIBERTY NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ALABAMA

**BRIEF FOR CONTINENTAL CASUALTY COMPANY,  
CNA CASUALTY COMPANY OF CALIFORNIA,  
COLUMBIA CASUALTY COMPANY, PACIFIC INDEMNITY  
COMPANY, FIBREBOARD CORPORATION  
AND THE GLOBAL HEALTH-CLAIMANT CLASS  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

No. 95-1873

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GUY E. ADAMS, *et al.*,

*Petitioners,*

—v.—

CHARLIE FRANK ROBERTSON and  
LIBERTY NATIONAL LIFE INSURANCE COMPANY,

*Respondents.*

---

ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ALABAMA

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**BRIEF FOR CONTINENTAL CASUALTY  
COMPANY, CNA CASUALTY COMPANY OF  
CALIFORNIA, COLUMBIA CASUALTY COMPANY,  
PACIFIC INDEMNITY COMPANY, FIBREBOARD  
CORPORATION AND THE GLOBAL HEALTH-  
CLAIMANT CLASS AS AMICI CURIAE  
IN SUPPORT OF RESPONDENTS**

---

**CONSENT OF PARTIES**

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately.

## INTEREST OF AMICI

Amici Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, Fibreboard Corporation and the Global Health-Claimant Class are parties to the Global Settlement recently upheld against constitutional challenge by the Fifth Circuit in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996). (The Fifth Circuit denied suggestions for rehearing en banc on November 26, 1996, and petitions for rehearing on December 3, 1996.) That Settlement is a mandatory, non-opt-out class action settlement under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure that resolves disputed insurance claims by creating a fund of over \$1.5 billion for the benefit of a plaintiff class of asbestos victims and establishes a process for equitably distributing that fund among class members. Although substantial distinctions exist between *In re Asbestos Litigation* and the case at bar, amici nevertheless have an interest in the present case because it, like *In re Asbestos Litigation*, involves a challenge to a mandatory class settlement by objectors asserting a constitutional opt-out right.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case comes before the Court on the following record: (a) the class settlement provides petitioners and their fellow class members with virtually complete relief for their claimed actual injuries, reforming class members' insurance policies in the precise manner they had sought and providing an \$11 million fund sufficient to give class members "full restitution of monetary benefits lost" (Pet. App. 10a-11a); and (b) the settlement was entered by a State court which, as set forth by respondent Liberty National, had personal jurisdiction over petitioners. The 400 petitioners — approximately one-tenth of one percent of the 400,000-member class — assert a constitutional entitlement to scuttle this settlement, and to deprive

the remainder of the class of its benefits, in order that they may individually pursue claims for "mental anguish" and punitive damages. Pet. Br. 18, 23.

Petitioners' argument rests primarily on language from *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985). In *Shutts*, the Court approved one of many state-law analogues to Fed. R. Civ. Pro. 23(b)(3), holding that — in a class action "wholly or predominately" for monetary damages in which the forum State otherwise did not have personal jurisdiction over the petitioners — opt-out rights were necessary to satisfy due process requirements. The Court should reject petitioners' attempt to transpose *Shutts*'s language to this very different case: this case involves primarily equitable relief, and *Shutts*, by its own terms, therefore has no applicability to this case. See Point I, *infra*.

No matter how the Court decides that issue, however, amici respectfully submit that it is important that no doubt be cast on the constitutionality of mandatory class actions under the Federal Rules of Civil Procedure, and in particular on the wide range of class resolutions of monetary claims provided for by Fed. R. Civ. P. 23(b)(1)(B). In such actions, class members have an overriding need to have their claims resolved on a unitary basis, and would be severely prejudiced if a few claimants were allowed to pursue individual windfall recoveries. As set forth below, any argument for a constitutional right to opt out would be particularly unfounded as applied to such federal actions: 300 years of historical practice and this Court's precedents establish that opt-out rights need not be provided when unitary resolution of a controversy is necessary, and general due process principles likewise require consideration of the heavy cost of opt-out rights in such cases, including the prejudice to other class members. See Point II, *infra*.



## ARGUMENT

### I. THIS CASE IS NOT “WHOLLY OR PREDOMINATELY FOR MONEY JUDGMENTS” WITHIN THE MEANING OF *PHILLIPS PETROLEUM CO. v. SHUTTS*

It has long been established, at common law and in this Court’s precedents, that in appropriate cases plaintiffs can and should be bound by mandatory class resolutions where “the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985), citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); see also *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854); pp. 10-13, *infra*. Indeed, this principle is explicitly recognized in Fed. R. Civ. P. 23(b)(1) and (b)(2), which set forth the circumstances under which certification of no-opt-out classes is appropriate. It is significant to note, at the outset, that petitioners apparently do *not* contend that such traditional, mandatory class actions are constitutionally invalid. See, e.g., Pet. Br. 29 (“In cases properly certified pursuant to (b)(1) and (b)(2) but which nonetheless include claims for monetary relief, courts have found that other safeguards may adequately compensate for the lack of an opt-out right.”), 30 (stressing petitioners’ view that the case at bar “was *not* properly certified under either Rule 23(b)(1) or (b)(2)” (emphasis added)), 36 (conceding the historical pedigree of mandatory class actions under Rule 23(b)(1)(B)).

Rather, petitioners’ primary contention, based on an out-of-context quotation from *Shutts*, is that there is a constitutional right to opt out of a *subset* of class actions — those that “seek to bind known plaintiffs concerning claims wholly or predominately for money judgments.” 472 U.S. at 811-12 n.3; see Pet. Br. 16-17, 20. Even if petitioners were correct in inferring such a right from *Shutts* (and they are

not\*) it would avail them nothing, for the entire premise of their argument — that *this* class action is “wholly or predominately for money judgments” — simply cannot be sustained on the record.

Indeed, far from being “wholly or predominately for money judgments,” the case at bar is in fact predominately equitable in nature.\*\* This case arises from Liberty National’s alleged wrongful switching of the terms of hundreds of thousands of cancer insurance policies to set certain limitations on coverage. Pet. App. 2a-3a. As the courts below found, the gravamen of the class’s claims was *equitable* — for reformation of the policies to reinstate their original terms so that class members would not be denied coverage *in the future*. Pet. App. 12a-13a, 76a, 84a; see generally *Calmar Steamship Corp. v. Scott*, 345 U.S. 427, 435 (1953) (reformation is an equitable

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\* To avoid unnecessary duplication, amici will not add to respondent Liberty National’s argument — with which amici agree — that the *Shutts* opt-out right is merely a means of obtaining personal jurisdiction over class members and does not apply where there are other valid bases of personal jurisdiction. Amici write separately, however, to emphasize a critical, independent limitation on the scope of *Shutts* — specifically, that it cannot be read to cast doubt on the well-established validity of mandatory class actions in cases, such as those certified under Fed. R. Civ. P. 23(b)(1) and (b)(2) and state-law analogues, in which mandatory resolution has long been considered necessary and appropriate.

\*\* Petitioners and certain amici suggest that the *Shutts* “wholly or predominately” determination must focus solely on the prayer for relief in the complaint, rather than on the substance of the claims actually at issue in the case. See Pet. Br. 18-19. But due process concerns itself with the *actual* interests of class members, which cannot always be determined from the complaint. For example, a class settlement may resolve claims that are not even included in the complaint, see, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996), or may resolve only *some* of the claims in the complaint. Moreover, looking only at the face of a complaint will often leave a court unable to tell which claims have potential merit, and thereby require the court to weigh substantial and insubstantial claims equally in determining which claims predominate. Finally, in some cases a class action is equitable in nature even where the relief prayed for is money damages. See pp. 13-14, *infra*.

remedy). Indeed, the trial court determined upon the basis of expert actuarial testimony that the implied value of the policy reformations constituted the majority of the \$39 million pecuniary value of the proposed settlement approved as modified by the court. Pet. App. 40a-42a.

Petitioner contends, contrary to these findings, that the central claims possessed by class members were for recovery of higher premiums paid under the switched policies, "mental anguish," and punitive damages. Pet. Br. 18. These claims, however, are clearly not the "whol[e] or predominate[ ]" portion of this action — they are at best appendages to and far outweighed by the claims for reformation of the policies. The court below expressly found that class members' claims for recovery of premiums were legally insubstantial. Pet. App. 15a-16a. And tag-along monetary claims like petitioners' "mental anguish" and punitive damages claims can be alleged to exist in *numerous* mandatory class actions, including those indisputably for equitable relief (such as for injunctive relief against illegal discrimination). Petitioners can cite no authority supporting the proposition that these pendent claims are so substantial as to predominate,\* and for good reason: their argument could effectively require opt-out rights in practically every class action on the basis of "pendent" monetary claims, and thereby radically transform both state and federal procedure. See, e.g., *Carson v. American Brands, Inc.*, 450 U.S. 79, 81 & n.2 (1981) (mandatory class in employment discrimination case); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 751 (1976) (same).

Indeed, as to punitive damages, the trial court found that allowing individual class members to seek punitive damages windfalls against Liberty National would "pose[ ] a substan-

\* Indeed, the "mental anguish" claims of class members like petitioners, who never even suffered any denial of benefits, are patently insubstantial. Petitioners, in fact, fail to offer any support — let alone any Alabama authority — for the notion that these tenuous claims are even cognizable.

tial threat to the interests of the class as a whole." Pet. App. 86a. As the court reasoned, the relief in which class members are principally interested — reformation of the policies to afford them full insurance coverage in the years to come — also gave them a critical interest in Liberty National's financial soundness and survival, an interest which would be imperiled by the prospect of large individual punitive damages awards. Pet. App. 86a. *Nothing* in the due process clause precludes the States from providing for the resolution of punitive damages as part of a fair mandatory settlement of class members' equitable claims where permitting individual punitive windfalls would prejudice the remainder of the class. Certainly nothing in *Shutts* — in which the class's claims were solely for compensatory damages, and in which there was no need for a unitary resolution (see 472 U.S. at 799-800) — works that result.

To the contrary, this Court has squarely held that due process does *not* prevent a state from providing for the unitary resolution of monetary claims where legitimate interests would be prejudiced by the failure to do so. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), for example, a State court issued a decree binding on all beneficiaries of a trust fund "settl[ing] all questions respecting the management" of the trust, including both claims regarding the distribution of the fund and *in personam* claims against the trustee for "negligence," "improper management" and "breach of trust." *Id.* at 311.\* The Court rejected a due process challenge by beneficiaries (who were not otherwise subject to personal jurisdiction in the State), reasoning that the State had a "vital interest . . . in bringing any issues as to its fiduciaries to a final settlement"; that this interest would be frustrated unless the State court could resolve *all* claims; and that "[a] construction of the Due Process Clause which would place

\* Although not technically a class action, *Mullane* closely resembled a class suit in that the claims of numerous absent beneficiaries were adjudicated on a representative basis. See *id.* at 319.



impossible or impractical obstacles in the way could not be justified." *Id.* at 313-14. *See also infra* pp. 10-13 (long tradition establishing permissibility of mandatory class actions where there is a legitimate need for such unitary resolution). Indeed, petitioners here have far less substantial interests in individual adjudication than did the beneficiaries in *Mullane*: the decision below would resolve not traditional compensatory damages claims (as in *Mullane*), but primarily "mental anguish" and punitive damages claims that are simply pendent to predominantly equitable claims. And the interest in preventing individual punitive damages windfalls from undermining the interests of other class members is plainly at least as important as the State's interest in *Mullane* of "bringing any issues as to its fiduciaries to a final settlement."

In sum, neither petitioners' insubstantial higher-premium and mental anguish claims nor their punitive damages claims provide any basis for their contention that this class action is one "wholly or predominately for money judgments," and no basis for requiring the Alabama courts to undermine their resolution of the action as a whole by carving out these tag-along claims.

## II. DUE PROCESS DOES NOT REQUIRE THE RIGHT TO OPT OUT OF THE INHERENTLY UNITARY CLASS ACTIONS CERTIFIED UNDER RULES 23(b)(1) AND 23(b)(2)

As noted earlier, amici agree with respondents' argument that the opt-out right referred to in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 n.3 (1985), has no application beyond the personal jurisdiction context. Amici respectfully submit, however, that there is another critical limitation on the *Shutts* opt-out holding that applies *regardless* of whether personal jurisdiction is at issue: *Shutts* is limited to non-traditional "common question" class actions of the type certified under Fed. R. Civ. P. 23(b)(3) or a state-law analogue\*; it has no application to the traditional mandatory,

\* *Shutts* itself was a "garden variety" damages class action (which did afford opt-out rights) brought on behalf of a class of 28,000 royalty

no-opt-out class actions certified under Rules 23(b)(1) and 23(b)(2).

Indeed, even petitioners apparently accept this distinction, as they do not challenge the courts' authority to resolve monetary claims in no-opt-out class actions properly certified under Rules 23(b)(1) and (b)(2). The gist of their claim is that the *Shutts* opt-out rule applies because the class herein "was *not* properly certified under either Rule 23(b)(1) or (b)(2)," Pet. Br. 30 (emphasis added), and they concede that the relevant due process considerations are considerably different in cases that *are* properly certified under one of these subdivisions (*see id.* at 29-31, 35-38). Thus, even if this Court were to agree with petitioners that a mandatory class action resolution was inappropriate *on the facts of this case*, there would be no occasion to call into question the validity — which, as demonstrated below, is well established — of mandatory class actions *properly* certified under subdivisions (b)(1) or (b)(2).

### A. The constitutionality of Rule 23(b)(1)-(b)(2) class actions is well settled

1. The reasons why *Shutts* does not extend beyond the Rule 23(b)(3)-type class action at issue there are rooted in the entirely distinct historical derivations of Rule 23(b)(1)-(b)(2) class actions and Rule 23(b)(3) class actions. The former are the modern-day versions of the traditional mandatory class action, which dates back to the seventeenth century and whose constitutionality has been settled for almost 150 years.\* The latter are, by contrast, a 1966 innovation whose owners residing in all 50 states, the District of Columbia and several foreign countries to whom the defendant oil company allegedly owed interest (in amounts averaging \$100 each) on certain delayed royalty payments from leased land located in 11 different states. *See* 472 U.S. at 799-801.

\* This well-established historical practice, of course, is entitled to great weight in assessing the due process calculus as it would apply to class actions under Rules 23(b)(1) and (b)(2), whether one views that historical practice as dispositive (*see, e.g., Burnham v. Superior Court*, 495



only historical antecedent — the “spurious,” opt-in action of the 1938 version of Rule 23 — was itself without historical roots, and was a permissive joinder device rather than a true class action. The version of Rule 23(b)(3) created by the 1966 amendments to the Rules was thus a new, liberalized type of opt-out class action not theretofore recognized, made available for litigation convenience and presenting entirely new and different constitutional issues.

Prior to the creation of the Rule 23(b)(3) class action, it was well-settled that absent class members’ due process rights are satisfied so long as they receive adequate representation. Opt-out rights were thus *not* required in those cases that then qualified for class treatment, even where class members’ claims were a collection of money damages claims and even where class members individually lacked any connection with the forum. Indeed, mandatory “representative suits involving money claims were adjudicated in equity as a matter of course from early times.” Z. Chafee, *SOME PROBLEMS OF EQUITY* 285 (1950). Examples include *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676) (mandatory bill of peace to determine the size of a tithe owed to a parson by his parishioners); *Brown v. Booth*, 21 Eng. Rep. 960 (Ch. 1690) (same); *Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action brought by two members of the crew of a privateer ship as representatives for the entire crew to establish crew members’ rights to a share of prize money); *Good v. Blewitt*, 33 Eng. Rep. 343 (Ch. 1807) (same); *Chaney v. May*, 24 Eng. Rep. 265 (Ch. 1722) (mandatory class action brought by one proprietor of a business as representative of “all other proprietors and partners” against the former treasurers and managers of the business for several “misapplications” totalling £50,000); and *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805) (mandatory class action to recoup alleged rent

U.S. 604, 610 (1990) (opinion of Scalia, J.)), or as a “significant indicator[ ] of what we as a people regard as fundamentally fair and rational.” *Schad v. Arizona*, 501 U.S. 624, 643 (1991) (plurality opinion).

overpayments under a contract to which numerous persons were parties). See generally Joseph Story, *COMMENTARIES ON EQUITY PLEADINGS*, §§ 97-98, 100, 120-21 (2d ed. 1840).

Under this settled practice, the courts of equity had power to resolve issues held in common by a large class of persons in order to prevent unfairness or inefficiency, even where the underlying individual claims that gave rise to this need for “equitable” unitary resolution were claims at law: it was “immaterial that the basic issues [were] legal and not equitable.” Chafee, *supra*, at 156 (emphasis added); see also *id.* at 151-52; *Adair*, 32 Eng. Rep. at 1159 (describing this practice as allowing “a person, having at Law a general right to demand service from the individuals of a large district . . . [to] sue thus in Equity”); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854) (“For convenience . . . and to prevent a failure of justice, a court of equity” may resolve “[t]he legal and equitable rights . . . of all being before the court by representation”) (emphasis added).

In such cases, where a need for unitary resolution existed, the courts required only that the interests of absent persons be adequately represented. As Justice Story explained:

In these and analogous cases of general right, the court dispense[s] with having all the parties, who claim the same right, before it, from the manifest inconvenience, if not impossibility of doing it, and is satisfied with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore binding, in a sense, that right.

— *West v. Randall*, 29 F. Cas. 718, 723 (C.C.D.R.I. 1820) (Story, J.).\*

\* See also Joseph Story, *COMMENTARIES ON EQUITY PLEADINGS* § 126 (2d ed. 1840).

This Court, moreover, has long upheld this common-law practice of permitting mandatory class resolution of monetary claims in appropriate cases. In *Smith v. Swormstedt*, *supra*, for example, a plaintiff class of ministers sued a defendant class seeking to establish its ownership of disputed assets. The Court sustained the maintenance of the suit on a mandatory class basis. *Id.* at 302-03. Where a unitary resolution is necessary to "prevent a failure of justice," the Court reasoned, adequacy of representation is all that is required, because "[t]he legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." *Id.* at 303.

More recent cases have consistently confirmed *Smith*'s conclusion. *See, e.g., Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 670-72 (1915) (mandatory class action to determine ownership of a fund); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) ("It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present."); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66, 78-79 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146, 149 (1917); *see also Mullane*, 339 U.S. at 311-14. Indeed, *Shutts* itself specifically endorsed these holdings. *See* 472 U.S. at 808.

The controlling principle of these cases is straightforward: where a legitimate need for unitary resolution exists, the general presumption in favor of individualized actions is subordinated to equitable concerns permitting a mandatory class action. *See, e.g., Smith*, 57 U.S. at 303 (citing the need to "prevent a failure of justice"); *Hartford Life*, 237 U.S. at 670 (citing the need to avoid "destructi[on] of [class members'] mutual rights"); *see also West v. Randall*, 29 F. Cas. at 723 (Story, J.) (describing the common-law practice of mandatory class resolution as standing on "[t]he principle . . . that the

court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil. . . .") (emphasis added); *Mullane*, 339 U.S. at 313-14 (citing the need to achieve a "final settlement," and stressing that due process cannot be construed to "place impossible or impractical obstacles in the way" of satisfying such a need).\*

2. Mandatory class actions under Rules 23(b)(1)-(b)(2) are the present-day equivalent of these traditional — and entirely constitutional — non-opt-out class actions. *See, e.g.,* Advisory Committee Notes to the 1966 Amendments to Rule 23, 39 F.R.D. 98, 100-01 (1966) (citing *Smith*, as an example of class actions falling within (b)(1)-(b)(2)).

Actions under these sections, like their traditional counterparts, are predominantly "equitable in nature." 1 H. Newberg & A. Conte, *NEWBERG ON CLASS ACTIONS* § 1.19, at 1-46 to 1-47 (3d ed. 1992).\*\* They trace their lineage from a

\* Petitioners' brief suggestion of an alternative explanation for these cases — that they involve "*in rem* claims" (Pet. Br. 36) — simply misdescribes the cases: *Mullane*, for example, expressly involved *in personam* claims (339 U.S. at 311-14); and *Smith* involved class members' assertion of "separate and distinct" legal claims of ownership of disputed funds (57 U.S. at 302). Petitioners also fail to explain why — other than that *in rem* cases will frequently implicate the requisite need for unitary resolution that justifies mandatory class actions — an *in rem/in personam* distinction should be of any significance here.

\*\* This is true even though both the claims and the ultimate form of relief may involve money, because, as noted above, the *nature* of the proceeding is essentially equitable, arising out of the exigencies that necessitate a common resolution of multiple parties' claims. Equity demands their joint determination so as not to disadvantage any of the multiple parties. *See Chafee, supra*, at 285; pp. 10-11, *supra*. One example of this is the limited fund genus of cases, which, "though they involve money claims individually," are in essence actions "to allocate pro rata an available fund that is insufficient to pay all claims," and therefore "are equitable in nature." 1 *NEWBERG ON CLASS ACTIONS*, § 1.19, at 1-47; *see also, e.g., In re Joint E. & S. Dist. Asbestos Litig. ("Johns-Manville")*, 129 B.R. 710, 832 (E. & S.D.N.Y. 1991), *vacated on other*



series of equitable procedural rules providing mandatory class mechanisms, including the seventeenth-century English Bill of Peace\* and Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no-opt-out class actions were recognized" and "absent parties could be bound by . . . judgments" (1 NEWBERG ON CLASS ACTIONS, § 1.09 at 1-24). Indeed, their direct precursors were the non-opt-out "true" and "hybrid" class action categories of original Rule 23 (adopted in 1938). 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.09 at 1-25 - 1-27; 3B James Moore & John E. Kennedy, MOORE'S FEDERAL PRACTICE ¶ 23.31[1], at 23-235 (1992).

In sharp contrast, opt-out class actions under Rule 23(b)(3) and its state-law equivalents were not in existence in any form at the time of *Smith* and *Hansberry* and the other cases cited above. Rule 23(b)(3) opt-out class actions instead originated with the 1966 revision of the Federal Rules permitting the combination of what are essentially individual actions for damages as to which "class action treatment is not as clearly called for as in [(b)(1) and (b)(2) actions], but . . . may nevertheless be convenient and desirable." *Advisory Committee's Note to Rule 23*, 39 F.R.D. 98, 101 (1966); *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 394 (1967)). To the extent (b)(3) class actions are traceable to any prior procedure, it is to the "spurious" class action of original Rule 23, which was essentially no more than a permissive joinder device, binding class members only if they affirmatively opted into the class. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967); 3B Moore's *Federal Practice*, ¶ 23.31[1], at 23-235.

*grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

\* *See, e.g.,* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 39-40 (1986); *see also* D. Laycock, MODERN AMERICAN REMEDIES 346-47 (1985) (bill of peace was a mandatory class mechanism).

Against this backdrop, it is clear that *Shutts*, in which this Court held that the Kansas equivalent of Rule 23(b)(3) was constitutional because it afforded opt-out rights (*see* 472 U.S. at 812), has no applicability to Rule 23(b)(1)-(b)(2) class actions and does not disturb their well-settled constitutionality:

*First*, the Court expressly stated that this holding was "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments," and that it was "intimat[ing] no view concerning other types of class actions, such as those seeking equitable relief." *Id.* at 811-12 n.3. And as noted above, Rule 23(b)(1)-(b)(2) class actions are most decidedly "equitable in nature."

*Second*, far from overruling *sub silentio* 150 years of precedent, *Shutts* took pains to endorse the prior cases upholding traditional mandatory class actions. Thus, it cited *Hansberry v. Lee* with approval for the point that where "the prosecution of the litigation [is] within the common interest" — *i.e.*, in a traditional mandatory class action\* — "[t]he absent parties [are] bound by the decree so long as the named parties adequately represented the absent class." 472 U.S. at 808 (emphasis added). Moreover, since *Shutts*, this Court has repeated the endorsement of *Hansberry*. *See Martin v. Wilks*, 490 U.S. 755, 761-62 & n.2 (1989). This Court's opinion in *Shutts* simply cannot be read as having discarded a century and a half of case law without saying so directly — indeed, while affirmatively praising the earlier cases.

*Third*, this Court also cannot have intended in *Shutts* silently to have done away with Rules 23(b)(1)-(b)(2) any time money is in any way implicated (which, as noted, it quite frequently is). Indeed, such a result would totally invalidate the Rule 23(b)(1)(B) "common" or "limited" fund class

\* *Compare Smith*, 57 U.S. at 302-03 (describing the mandatory class action upheld there as one asserting a "common interest"); *Ibs*, 237 U.S. at 670-72 (also using the "common interest" formulation).



action, which *always* involves money. Especially since the Rules are presumed constitutional, *see Hanna v. Plumer*, 380 U.S. 460, 471 (1965), that cannot possibly have been this Court's intention. *See* 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.21 at 1-49 (*Shutts* is limited to Rule 23(b)(3) class actions for this reason).\*

3. To the extent this Court looks beyond *Shutts* and the historical pedigree of mandatory class actions to the due process balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), that test fully confirms the historically settled permissibility of such class actions in cases where there is a need — as in Rule 23(b)(1) and (b)(2) class actions — for unitary resolution. The *Mathews* test balances (1) “the private interest that

\* For these reasons, cases and commentators have overwhelmingly concluded that *Shutts* leaves intact the long-established propriety of non-opt-out class actions under Rules 23(b)(1)-(b)(2). *See, e.g., Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994) (*Shutts* does not apply to a 23(b)(2) class; “[i]n a Rule 23(b)(2) class for equitable relief, the due process rights of absent class members generally are satisfied by adequate representation alone”); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 (3d Cir.) (finding due process requirements satisfied in state analogue to 23(b)(1) and 23(b)(2) class action because class members received “notice plus an opportunity to be heard and participate in the litigation”), *cert. denied*, 115 S. Ct. 480 (1994); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1302-05 (2d Cir. 1990) (assuming, without even referring to *Shutts*, that there was no right to opt out of a 23(b)(1)(B) class, although permitting a single class member to opt out in the discretion of the District Court); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1101 (Del. Supr. 1989) (holding that no due process right to opt out exists under (b)(2), even though portion of relief sought was monetary); *Arnold v. United Artists Theater Circuit*, 1994 U.S. Dist. LEXIS 15345 (N.D. Cal., Sept. 15, 1994); *White v. National Football League*, 822 F. Supp. 1389, 1410-12 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995); Sherman, *Symposium: Class Actions and Duplicative Litigation*, 62 Ind. L. J. 507, 525 (1987); Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. Mich. J. L. Ref. 347, 376 (1988); Steve Baughman, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex. L. Rev. 211, 217-20 (1991).

will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 335. Where, as here, the due process issue concerns “disputes between private parties rather than between an individual and the government,” the third *Mathews* factor is modified so that “principal attention” is paid to the interests of other affected private parties “with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.” *Connecticut v. Doeher*, 501 U.S. 1, 11 (1991).

All three *Mathews* factors weigh in favor of the conclusion that opt-out rights are not constitutionally required in mandatory class actions properly certified under the Federal Rules. First, *Shutts* itself makes clear that a class member’s “private interest” in avoiding class resolution of his cause of action is considerably less than the interest of a defendant haled into court to defend himself “upon pain of a default judgment.” “The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant.” *Shutts*, 472 U.S. at 808-09.

Second, turning to the “risk of error” that is the focus of the second *Mathews* factor, the carefully designed protections of Rule 23, and the precedents set forth above, demonstrate that there is “very little danger” (*Smith*, 57 U.S. at 303) of an erroneous deprivation where class members are adequately represented by persons with similar interests. *See* pp. 11-12, *supra*; *see also Martin v. Wilks*, 490 U.S. 755, 761-62 & n.2 (1989) (adequate representation in class action permits “exception to the general rule” that every person is entitled to his own day in court); *Shutts*, 472 U.S. at 808 (citing *Hansberry v. Lee*,

311 U.S. 32, for the proposition that absent class members will be bound "so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest"); *Hansberry*, 311 U.S. at 42-43.\*

*Third*, the final *Mathews* factor, focusing on the private and societal cost of requiring additional procedures, weighs overwhelmingly *against* recognition of an opt-out right in cases where there is a need for unitary resolution, such as those falling within the mandatory class action provisions of the Federal Rules. The historical precedents discussed above developed precisely out of equity courts' recognition that class members (or the party opposing the class) could be profoundly prejudiced absent a unitary resolution of the class's claims. See *Smith*, 57 U.S. at 302-03; *West*, 29 F. Cas. at 722-23 (Story, J.); *Adair*, 32 Eng. Rep. at 1159. For example, "[b]y definition, it is impossible to resolve separately individual claims involving common rights or limited funds." Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 40 (1986). Class actions under Rules 23(b)(1) and (b)(2) thus frequently may involve "equitable circumstances dictat[ing] the need for a unitary resolution regardless of the individual consent of the parties affected. The societal cost of permitting opt-outs for the purpose of individual resolutions in these inherent class action situations could be enormous,

\* While adequate representation is a feature of all subdivisions of Rule 23, the *Mathews* "risk of error" in precluding opt-outs is particularly low in actions qualifying for certification as mandatory class actions under the Federal Rules, as compared with those qualifying only under Rule 23(b)(3). This is so because the classes that qualify for mandatory treatment under the Federal Rules are characterized by a greater degree of "cohesiveness" or "unity" compared with Rule 23(b)(3) classes. See, e.g., *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 & n.1 (3d Cir. 1983) ("Rule 23(b)(3) classes are less cohesive, and must abide by more stringent due process constraints."); 3 NEWBERG ON CLASS ACTIONS, § 16.17, at 16-95.

compared to the modest gains at best in constitutional terms for additional individual procedural rights." 1 NEWBERG ON CLASS ACTIONS § 1.22, at 1-51.

This considerable cost contrasts dramatically with the minimal difficulty of providing opt-out rights in Rule 23(b)(3) class actions (such as that at issue in *Shutts*), in which a class is certified *not* to protect class members from prejudice arising from prosecution of separate suits, but for litigation convenience. See, e.g., Advisory Committee's Note, 39 F.R.D. at 102. In these class actions, claims of class members who opt out may easily be adjudicated separately without prejudicing the rights of other class members.

4. In light of the foregoing, amici respectfully submit that the constitutionality of mandatory class actions properly certified under Fed. R. Civ. P. 23(b)(1) and (b)(2) cannot reasonably be questioned. Moreover, given that petitioners do not contend otherwise — rather, they contend that the case at bar was *not* properly certified under these subdivisions, Pet. Br. 30 — there is no occasion in this case to call into question the long-established validity of mandatory class actions that have been properly certified under these subdivisions of the Rule.

**B. Class actions certified under Rule 23(b)(1)(B) present a uniquely compelling case for mandatory resolution.**

As just set forth, amici believe that mandatory, no-opt-out procedures are constitutional in *all* of the modern-day versions — including both cases falling within subdivision (b)(1) and those within subdivision (b)(2) — of the traditional class actions long upheld by this Court. Amici wish to stress, however, that there is a *uniquely* compelling case for mandatory treatment of classes qualifying under Rule 23(b)(1)(B), a case that should not be foreclosed in an action — like the one at bar — whose facts fit most closely within the framework of a 23(b)(2) class action.



Thus, in many class actions certified under Rule 23(b)(2) — as, for example, in the class action underlying *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) — the justification for mandatory treatment of damages claims is not that individual litigation of the monetary claims will be harmful, but rather simply that such claims are ancillary to a unitary nondamages claim. See 1 NEWBERG ON CLASS ACTIONS § 1.22, at 1-51 n.188.

In contrast, in cases qualifying for class treatment under Rule 23(b)(1)(B), individual litigation of damages claims is harmful; indeed, it is precisely that potential harm that provides the justification for certifying the class. Cases within Rule 23(b)(1)(B) are *by definition* cases in which class members have an overriding need for their claims to be resolved without opt-outs: by its terms the Rule only applies where there is a risk that “adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members . . . or substantially impair or impede their ability to protect their interests.”\* As the 1966 Advisory Committee noted in promulgating the present version of Rule 23, “[t]he difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class [in Rule 23(b)(1) actions] furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.” Advisory Committee’s Note, 39 F.R.D. at 100.

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\* For example, a paradigm case fitting within Rule 23(b)(1)(B) is that of claims against a limited fund. In such cases, both the purpose of the class action — to apportion limited resources equitably — and the interests of other class members would be undermined if individual members could opt out and obtain more than their fair share of the fund. Requiring opt-outs in such cases “besides being oxymoronic, [would be] contrary to the very purpose” of Rule 23(b)(1)(B). *In re Joint E. & S. Dist. Asbestos Litig. (“Johns-Manville”)*, 129 B.R. 710, 832 (E. & S.D.N.Y. 1991) (internal quotation omitted), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

In short, in view of the pressing need for unitary treatment of Rule 23(b)(1)(B) cases, “[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.” *Mullane*, 339 U.S. at 314. Thus, although amici believe that the judgment below should be affirmed, amici submit that it is of great importance, even if this Court should choose to reverse, that the Court not cast doubt upon the continuing validity of mandatory class actions under Rule 23(b)(1)(B).



### Conclusion

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgment below and reaffirm the constitutionality of no-opt-out class actions pursuant to Rules 23(b)(1) and 23(b)(2).

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